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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-.....

GEORGE D. OWEN,
Petitioner,

vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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GEORGE D. OWEN,
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vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit dated December 1, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals on Remand is reported at 589 F.2d 335 and is printed in Appendix A at pp. A1-A7. The prior opinion of the Court of Appeals is reported at 560 F.2d 925 and is printed in Appendix B at pp. A8-A45. This Court's previous memorandum order is reported at 438 U.S. 902, 98 S.Ct. 3118, 57 L.Ed.2d 611, and is printed in Appendix D at p. A79. The opinion of the District Court is reported at 421 F.Supp. 1110 and is printed in Appendix C at pp. A46-A78.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 1, 1978. Petition for rehearing was denied by a divided court on January 29, 1979. The time for filing a petition for writ of certiorari was extended to May 29, 1979 by order of Justice Blackmun signed April 10, 1979. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should the qualified immunity available to local officials in their individual capacities under *Wood* v. *Strickland* be extended to local governmental bodies?

2. If qualified immunity is extended to municipalities, should it be further extended to bar declaratory and equitable relief as well as damages?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On and before April 18, 1972, petitioner was employed as the chief of police of Independence. Under Section 3.3(1) of the city charter, he could be removed by the city manager only "when deemed necessary for the good of the service." (App. at A32)

During a city council meeting on April 17, 1972, Paul Roberts, in his capacity as city councilman, read a written statement "impugning Owen's honesty and integrity." (App. at A31) The statement alleged that Owen had misappropriated police department property, that narcotics had "mysteriously" disappeared from his office, and that high ranking police officials had made "inappropriate" requests affecting the police court. It also alleged manipulation of traffic tickets, the "unusual release of felons" and the mysterious disappearance of money. As part of his statement, Roberts moved that certain "investigative reports" allegedly supporting the allegations be turned over to the

prosecutor for presentation to the grand jury, that they be released to the press and that the city manager take "direct and appropriate action" against those "involved in illegal, wrongful, or gross inefficient activities." The full text of the statement and motion is set forth at A54 n. 2.

The city council by official action passed the motion with one abstention and no dissents, thus lending its support to Roberts' charges. (App. at A16, A31) The following day, the city manager discharged Owen. (App. at A26) The discharge notice contained no reason for the discharge but stated simply that Owen was "[t]erminated under the provisions of Section 3.3(1) of the City Charter." (App. at A31) The city manager reinforced the council's implication that Owen was guilty of wrongdoing by publicly announcing that he was referring the reports of alleged police department inefficiency to the prosecutor for submission to the grand jury. (App. at A3-4 and A31 n. 11) He did not disavow the charges or the council's actions or take any steps to contradict reports that Owen's discharge was the direct result of the alleged misconduct.

The press and public were present at the April 17, 1972 city council meeting. (Tr. at 12, 49, 82 and 189) Copies of the statement and motion were distributed to them. The statement, motion and firing received widespread publicity. (App. at A31) The area newspapers printed the statement and motion substantially verbatim and reported the adoption of the motion. Front page articles appeared for several days under headlines such as "Lid Off Probe, Council Seeks Action" (Independence Examiner, April 18, 1972, P.Ex. 5, Tr. 25); "Independence Accusation. Police Probe Demanded" (Kansas City Times, April 18, 1972, P.Ex. 6, Tr. 25); "Probe Culminates in Chief's Dismissal" (Independence Examiner, April 19, 1972, P.Ex. 13, Tr. 27) and "Police Probe Continues; Chief Ousted". (Community Observer, April 20, 1972, P.Ex. 14, Tr. 27) A copy of the statement and motion was placed in the City's permanent records. (Tr. at 81-82)

Owen's request for a hearing was denied by the City by letter dated May 3, 1972 from the city counselor's office. (App. at A4 and A17) The grand jury subsequently returned a no true bill.

Owen brought suit under 42 U.S.C. §1983, and the Fourteenth Amendment asserting jurisdiction under 28 U.S.C. §1331, 28 U.S.C. §1343(3) and 28 U.S.C. §1343(4). He sought declaratory and equitable relief, including a hearing on his discharge, back pay and attorney's fees. The District Court entered judgment for defendants. (App. C)

On appeal, the United States Court of Appeals for the Eighth Circuit reversed, ordering the entry of a declaratory judgment that Owen's discharge had deprived him of liberty without due process of law. In lieu of an award of full back pay, it ordered equitable compensation measured by the amount Owen would have earned to retirement if he had not been deprived of his good name by the actions of the City less mitigation. The Court of Appeals held that the District Court had jurisdiction under 28 U.S.C. §1331 to grant equitable relief for Owen's Fourteenth Amendment claims. The court found it unnecessary to decide whether, under 28 U.S.C. §1343 and 42 U.S.C. §1983, the District Court also had jurisdiction to grant equitable relief against the city officials in their official capacities. (App. at A22)

On June 26, 1978, this Court vacated the Court of Appeals' prior decision for reconsideration in light of *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). On remand, the Court of Appeals found that the City of Independence was subject to suit under *Monell* since the ac-

tions in question were those of the City's highest ranking officials. (App. at A3-4) It again found that petitioner had been deprived of liberty without due process. (App. at A3) However, the Court of Appeals ruled that petitioner should be denied all relief on the basis that the City was entitled to qualified "good faith" immunity.[1] The Court rejected petitioner's contentions (a) that the defense of "good faith" is limited to officeholders in their individual capacities and does not extend to governmental entities, (b) that qualified immunity does not forbid the granting of equitable relief, and (c) that qualified immunity does not justify refusal to issue a declaratory judgment. Rehearing and rehearing *en banc* were denied by a vote of five to two.

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1. Paradoxically the Court concluded that, prior to *Roth* and *Sindermann*, the City could not have known that its actions violated Owen's rights despite recognizing that:

> "Before Owen's discharge, the Supreme Court appeared to find a liberty interest '[w]here a person's good name, reputation, honor, or integrity [was] at stake because of what the government [was] doing to him,' which, when infringed, required the Government to provide the individual with notice and an opportunity to be heard. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). However, not until the *Roth* and *Sindermann* cases did the Court first recognize that a public employee, in the context of being terminated under circumstances imposing a stigma on his professional reputation and impairing his ability to find future employment, was entitled to notice and a name-clearing hearing."

The City Council of Independence did not need to be aware of subsequent decisions of this Court to know that its official actions would seriously damage Owen's "good name, reputation, honor and integrity."

REASONS FOR GRANTING THE WRIT

I

The Decision Below Erred in Its Resolution of an Important and Recurring Issue Significantly Affecting the Administration of Justice—Whether Qualified Immunity Should Be Extended to Local Governmental Bodies.

The question raised in the present case is whether the qualified immunity available to local officials under *Wood* v. *Strickland*, 420 U.S. 308 (1975) is to be extended to cover local governmental bodies sued directly. In *Monell*, this Court expressly deferred ruling on the issue because it had not been briefed by the parties nor discussed by the lower courts. It remains an important question which has not been, but should be, settled by this Court.

Resolution of the issue posed in this petition will significantly clarify enforcement of constitutional rights through 42 U.S.C. §1983. The substantial number of §1983 cases need hardly be emphasized.[2] Faced with this case load, the District Courts need early and definitive guidance on the difficult question left for another day in *Monell* —whether qualified immunity extends to local governmental bodies as well as to local officials. In the end, the question can be answered only by this Court. Delay in providing the answer will lead, at best, to further protraction of litigation in the already overburdened District Courts. At worst, it will lead to unjust results and unnecessary retrials.

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2. Private cases classified as "Civil Rights—Other Civil Rights" or as "Prisoner Petitions—Civil Rights" represented more that 11% of all civil filings for the year ending June 30, 1978. Administrative Office of the United States Courts, *1978 Annual Report of the Director* at A16-A17 (1978).

The importance of resolving this question is underlined by the decision below which misconstrues §1983 and *Monell*. The considerations which led this Court to grant qualified immunity to local officials have no validity if applied to suits brought directly against local governments. Public treasury liability will not deter the most capable candidates from seeking public office. *Cf., Birnbaum* v. *United States*, 588 F.2d 319 (2nd Cir. 1978). It will not cause undue timidity in decision making. *Carter* v. *Carlson*, 447 F.2d 358, 367 (D.C. Cir. 1971), *rev'd on other ground sub nom., District of Columbia* v. *Carter*, 409 U.S. 418 (1973). Rather it insures that the public as a whole, which receives the benefits of governmental policies, bears the costs of unconstitutional ones. Denying public treasury liability places the entire cost of a constitutional tort on the innocent victim. Moreover, immunity from suit for violations of all rights which have not already been recognized destroys the incentive for litigation leading to the recognition of new rights.[3]

One aspect of the Court of Appeals' opinion could, if upheld, have unfortunate consequences far beyond the area of §1983.

This Court has repeatedly exercised its salutary power to note the existence of an issue and yet to defer ruling on it. *E.g., Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 279 (1977); *In re Primus*, 436 U.S. 412, 440 (1978) (Justice Blackmun, concurring); *Robertson* v. *Wegmann*, 436 U.S. 584, 594 (1978). The Court did so in *Monell* by going out of its way to state that it expressed no view on qualified municipal immunity. 436 U.S. at 701. The power to reserve ruling on an issue permits this Court to observe

3. This is particularly true, if, as in the present case, the immunity is extended to bar equitable relief, declaratory judgments and attorney's fee awards.

the constitutional limitation that it decide only cases and controversies presented to it and the prudential rule that it not decide issues which have not been briefed and argued by the parties or addressed by the lower courts. It can serve those functions only if the lower courts recognize that this Court's postponing ruling on an argument does not imply that the argument has merit. In the present case, the Court of Appeals failed to do so. Instead, it treated *Monell's* deferral of the qualified immunity issue as a final determination that qualified immunity was a valid defense, stating "We imply from the Court's discussion of immunity that local governing bodies may assert a limited immunity defense to actions brought against them under section 1983." (App. at A4-A5) It apparently felt that the "ruling" it inferred required it to disregard its own previous conclusion that the primary justifications for immunity did not exist in suits against public entities. (App. at A39)

II

The Decision Below Conflicts With Decisions of Other Courts of Appeal on Whether Local Governmental Bodies—As Opposed to Local Officials—May Assert a "Good Faith" Defense to Suits Under 42 U.S.C. §1983.

The decision below conflicts with decisions in three other circuits which have ruled that the good faith immunity of *Wood* v. *Strickland* does not extend to cover local governmental bodies. In *Hander* v. *San Jacinto Junior College*, 519 F.2d 273, 277 at n. 1 (5th Cir. 1975), *aff'd per curiam on rehearing*, 522 F.2d 204 (5th Cir. 1975), the defendants argued that, under *Wood*, good faith precluded any award. The Fifth Circuit rejected that argument and affirmed the award stating:

"The *Wood* rationale, however, is inapplicable to the instant case because the backpay award is entered against San Jacinto Junior College itself and not against the individual members of the Board of Regents."

Similarly, in *Hostrop* v. *Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976), the Seventh Circuit held that the good faith immunity of a school board's members did not protect the board as an entity from liability for damages resulting from a procedurally deficient discharge.

The Fourth Circuit has taken the same position. In *Bursey* v. *Weatherford*, 528 F.2d 483, 488 at n. 8 (4th Cir. 1975), *rev'd on other grounds*, 429 U.S. 545 (1977), the Court of Appeals instructed the lower court that, in a suit against the individual defendants in their official capacities, ". . . the defense that they acted in good faith is inapplicable." Similarly, in *Thomas* v. *Ward*, 529 F.2d 916 (4th Cir. 1975), *disapproved as to measure of damages, Carey* v. *Piphus*, 435 U.S. 247 (1978), it held that back pay could be awarded against administrators and school board members in their official capacity even though their good faith barred such an award against them in their individual capacities.

The Eighth Circuit's opinion also conflicts with its own pre-*Monell* decisions. In *Wellner* v. *Junior College Board*, 487 F.2d 153 (8th Cir. 1973) and in *Cooley* v. *Board of Education of Forrest City School District*, 453 F.2d 282, 287 (8th Cir. 1972), the Court had awarded back pay against school boards without regard to good faith.

The Court of Appeals for the Tenth Circuit is presently considering the issue *en banc*. *Bertot* v. *School District No. 1, Albany County, Wyoming*, No. 76-1159 (Argued May 15, 1979).

III

The Decision Below Misinterprets §1983 by Denying Equitable and Declaratory Relief and by Denying Petitioner Attorneys Fees.

The Court of Appeals previously held, *inter alia*, "Owen is entitled to a declaratory judgment that his discharge from employment deprived him of constitutionally protected liberty without due process of law." (App. at A41) The present panel decision agreed that Petitioner had been deprived of liberty without due process. (App. at A3) However, without discussion, it failed to grant Petitioner a declaratory judgment to that effect and to remand for determination of attorneys fees. (App. at A7)

Since the Court of Appeals has twice held that Petitioner's rights have been violated, Petitioner knows no basis or authority for its refusal to order the entry of a declaratory judgment to that effect. *Cf. Carey* v. *Piphus*, 435 U.S. 247, 252 (1978). In a case such as this, in which Petitioner's good name, reputation and honor are at stake, a declaratory judgment is important for its own sake. Moreover, it would permit Petitioner to recover his attorneys fees under the Civil Rights Attorneys' Fees Awards Act of 1976 and this Court's decision in *Hutto* v. *Finney*, 437 U.S. 678 (1978).

The decision below also held that qualified immunity stood as a bar, not only to damages, but also to the Petitioner's claims for equitable relief. (App. at A5-A6) This holding represented a complete reversal of the Court of Appeals' previous position that "The good faith of the municipality does not constitute a defense to monetary relief as an element of equitable relief." (App. at A38-39) It was a drastic departure from previous holdings. *E.g., Strickland* v. *Inlow*, 485 F.2d 186, 190 (8th Cir. 1973) ("Good faith is

a defense in damage actions, but not in actions for equitable relief."), *position on immunity sustained sub nom., Wood* v. *Strickland,* 420 U.S. 308, 314-315 n. 6 (1975) ("immunity from damages does not ordinarily bar equitable relief as well.") On remand, the *Wood* plaintiffs were held entitled to equitable relief clearing their records regardless of any claim of good faith. Restitution in the form of back pay (or its lesser monetary equivalent) has consistently been held to be an incident to equitable relief. *N.L.R.B.* v. *Jones & Laughlin Steel Corporation,* 301 U.S. 1, 47-48 (1937).

Sustaining a holding that "good faith" bars declaratory and equitable relief as well as damages would effectively eliminate incentives to test the constitutionality of any governmental action not previously declared unconstitutional. It would reduce most pioneering constitutional litigation to a request for an advisory opinion since no relief could be granted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 76-1758

George D. Owen,
Appellant,

v.

The City of Independence, Missouri, Lyle W. Alberg, City Manager, Richard A. King, Mayor, Charles E. Cornell, Dr. Ray Williamson, Dr. Duane Holder, Ray A. Heady, Mitzi A. Overman, and E. Lee Comer, Jr., Members of the Council of the City of Independence, Missouri,
Appellees.

No. 76-1799

George D. Owen,
Appellee,

v.

The City of Independence, Missouri, Lyle W. Alberg, City Manager, Richard A. King, Mayor, Charles E. Cornell, Dr. Ray Williamson, Dr. Duane Holder, Ray A. Heady, Mitzi A. Overman, and E. Lee Comer, Jr., Members of the Council of the City of Independence, Missouri,
Appellants.

Appeals From the United States District Court
for the Western District of Missouri.

OPINION ON REMAND

Filed: December 1, 1978

Before VAN OOSTERHOUT, Senior Circuit Judge; BRIGHT and ROSS, Circuit Judges.

BRIGHT, Circuit Judge.

In *Owen* v. *City of Independence, Mo.*, 560 F.2d 925 (8th Cir. 1977), this court, relying on *Monroe* v. *Pape*, 365 U.S. 167 (1961), determined that appellant George D. Owen could not bring an action under 42 U.S.C. § 1983 (1970) against the City of Independence because it was not a "person" within the meaning of that statute, but that the municipality was subject to suit under an implied right of action arising directly from the fourteenth amendment of the Constitution. The Supreme Court granted the petition for writ of certiorari by the City of Independence, vacated the judgment, and remanded the case to us "for further consideration in light of *Monell* v. *Dept. of Social Services of the City of New York*, 436 U.S. ....., 98 S.Ct. 2018, 56 L.Ed2d ..... (1978)." *City of Independence, Missouri* v. *Owen*, ... U.S. ....., 98 S.Ct 3118 (1978). *Monell* modified *Monroe* v. *Pape* and permits section 1983 actions against local governing bodies.

On this remand we consider these questions: (1) under *Monell, supra*, does Owen demonstrate that official municipal policy deprived him of constitutional rights, in violation of section 1983; and (2) under the particular circumstances of this case with the narrow issue presented, is the City immune from damages. We answer both questions affirmatively. Our decision upon the second question requires a dismissal of the action.

1. Section 1983 Action.

The pertinent facts are set forth in our prior opinion. *Owen, supra* at 927-31. In *Monell*, the Supreme Court held that municipalities and other local government units could be sued as "persons" under section 1983 when

> the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. [*Monell, supra* at ....., 98 S.Ct. at 2036.]

The Court determined that congressional intent permitted municipalities to be held liable when "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* Although the language of section 1983 has not been read to impose vicarious liability on municipalities solely for the misdeeds of their employees, *Monell* makes clear that "when execution of a government's policy or custom [is] made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, [and it] inflicts the injury * * * the [municipality] as an entity is responsible under § 1983." *Monell, supra* at ....., 98 S.Ct. at 2038.

Turning to the application of *Monell* to the facts of this case, we noted in our prior opinion that the actions of the City of Independence deprived Owen of his constitutional right to liberty. *Owen, supra* at 934-37. The City stigmatized Owen when it reinforced councilman Roberts' allegedly slanderous charges of August 1972 by directing that an investigative report alleging misconduct in the police department be referred to the county prosecutor for presentation to the grand jury. In addition, after the city manager terminated Owen's employment as police chief he publicly announced the referral of the investiga-

tive reports concerning police department inefficiencies to the county prosecutor for further action. The city charter of Independence did not entitle the police chief to a name-clearing hearing in connection with his discharge, and Owen was not given one. We conclude that the stigma attached to Owen in connection with his discharge was caused by the official conduct of the City's lawmakers, or by those whose acts may fairly be said to represent official policy. Such conduct amounted to official policy causing the infringement of Owen's constitutional rights, in violation of section 1983.

A post-*Monell* interpretation of section 1983 permits Owen to sue the City of Independence directly and, therefore, we find it unnecessary to rely on the *Bivens* doctrine as we did in our previous opinion. By enacting section 1983, Congress has provided an appropriate and exclusive remedy for constitutional violations committed by municipalities. Consequently, no reason exists to imply a direct cause of action under the fourteenth amendment.

II. Immunity.

In the particular circumstances of this civil rights action, we hold that the City of Independence is entitled to qualified immunity from liability.

The Supreme Court decided in *Monell* that municipal bodies sued under section 1983 are not protected by absolute immunity. However, both the Court's majority and Mr. Justice Powell's concurring opinion indicate that even after *Monell*, municipalities may have some limited immunity in section 1983 cases, the boundaries of which are yet to be defined. *Monell, supra* at ....., 98 S.Ct. at 2038, 2041, 2044, 2047. We imply from the Court's discussion of immunity that local governing bodies may assert a

limited immunity defense to actions brought against them under section 1983.

In the instant case, Owen contended that he possessed a property interest in continued employment as police chief and, upon being discharged, demanded a due process hearing. In our prior opinion we rejected Owen's contention relating to an alleged property interest. *Owen, supra* at 937-38.

Regarding the liberty interest, we previously decided that the municipal employer, in connection with the termination of Owen as the police chief of Independence, in effect made a "charge" which might seriously damage Owen's standing and reputation in the community. *Owen, supra* at 935-37. That is, "[t]he fact of actual stigma to Owen *connected with his discharge* is undeniable, for the action of the City of Independence as employer served to blacken Owen's name and reputation." *Owen, supra* at 937. In addition, the City of Independence did not provide Owen with a hearing to vindicate his name. Accordingly, we held that the action of the City of Independence deprived Owen of a liberty interest without due process of law.

The district court, however, as an alternative ground for denying Owen relief, determined that the individual defendants established a good faith defense to Owen's charges by demonstrating that they could not reasonably have known of any obligation to afford Owen a name-clearing hearing and that they acted without malice in not providing such a hearing. *Owen* v. *City of Independence, Mo.*, 421 F. Supp. 1110, 1117-18 (W.D. Mo. 1976), *modified*, 560 F.2d 925 (8th Cir. 1977). In our prior opinion we recognized the probable applicability of the good faith defense to a claim for damages, while we rejected its

use in an action where backpay is an element of the equitable relief sought, as in the instant case. *Owen*, 560 F.2d at 940. *Monell* undermined such a distinction when the Supreme Court answered in the affirmative the following query raised by the grant of certiorari:

> "Whether local governmental officials and/or local independent school boards are 'persons' within the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?" [*Monell* v. *Dept. of Social Services of the City of New York*, 436 U.S. ....., 98 S.Ct. 2018, 2021 (1978).]

That answer, in light of the immunity discussion in *Monell*, suggests that a limited immunity defense will apply to claims for equitable relief against municipalities.

The Supreme Court's decisions in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), crystallized the rule establishing the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge. The Court decided those two cases two months after the discharge in the instant case. Thus, officials of the City of Independence could not have been aware of Owen's right to a name-clearing hearing in connection with the discharge.[1] The City of Independence should not be

1. Before Owen's discharge, the Supreme Court appeared to find a liberty interest "[w]here a person's good name, reputation, honor, or integrity [was] at stake because of what the government [was] doing to him," which when infringed, required the Government to provide the individual with notice and an opportunity to be heard. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971). However, not until the *Roth* and *Sindermann* cases did the Court first recognize that a public employee, in the context of being terminated under circumstances imposing a stigma on his professional reputation and impairing his ability to find future employment, was entitled to notice and a name-clearing hearing.

charged with predicting the future course of constitutional law. *See Wood* v. *Strickland*, 420 U.S. 308, 322 (1975); *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967); *Sullivan* v. *Meade Independent School District No. 101*, 530 F.2d 799, 806 (8th Cir. 1976). We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice. We hold the City not liable for actions it could not reasonably have known violated Owen's constitutional rights.

Accordingly, our prior opinion, *Owen* v. *City of Independence, Mo.*, 560 F.2d 925 (8th Cir. 1977), stands modified by this supplemental opinion on remand. Based on both this and our previous opinion, we affirm the judgment of the district court denying Owen any relief against the defendants in this case.

VAN OOSTERHOUT, Senior Circuit Judge, specially concurring.

I fully concur in the result and the basic reasoning supporting the affirmance in the majority opinion. I still adhere to my view expressed in my dissent in the former appeal at 560 F.2d 925, 941, and consider it an alternate basis for affirmance.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 76-1758

George D. Owen,
Appellant,

v.

The City of Independence, Missouri, Lyle W. Alberg, City Manager, Richard A. King, Mayor, Charles E. Cornell, Dr. Ray Williamson, Dr. Duane Holder, Ray A. Heady, Mitzi A. Overman, and E. Lee Comer, Jr., Members of the Council of the City of Independence, Missouri,
Appellees.

No. 76-1799

George D. Owen,
Appellee,

v.

The City of Independence, Missouri, Lyle W. Alberg, City Manager, Richard A. King, Mayor, Charles E. Cornell, Dr. Ray Williamson, Dr. Duane Holder, Ray A. Heady, Mitzi A. Overman and E. Lee Comer, Jr., Members of the Council of the City of Independence, Missouri,
Appellants.

Appeals from the United States District Court for the Western District of Missouri

Submitted: March 16, 1977
Filed: August 15, 1977

Before VAN OOSTERHOUT, Senior Circuit Judge; BRIGHT and ROSS, Circuit Judges.

BRIGHT, Circuit Judge.

Following his discharge in April 1972 as chief of police of Independence, Missouri, appellant George D. Owen filed this civil action against the City of Independence, city manager Lyle W. Alberg, and the present members of the city council in their official capacities.[1] Owen seeks a declaration that his discharge violated his constitutional right to due process, and prays for a mandatory injunction reinstating[2] him as chief of police with backpay. After a bench trial, the district court held that Owen could assert a claim against the City and its council members in their official capacities arising directly from the fourteenth amendment under the general federal question jurisdiction statute, 28 U.S.C. §1331, but the court denied Owen relief on the merits. Owen appeals. Appellees cross-appeal, asserting that the City and the individual defendants are not amenable to suit under 28 U.S.C. §1331 and the fourteenth amendment. The district court opinion is reported at 421 F. Supp. 1110 (W.D. Mo. 1976). For reasons stated below, we affirm on the City's cross-appeal and reverse and remand on Owen's appeal.

The district court's findings of fact, quoted in part below, furnish the background needed for understanding the issues presented here:

1. These council members replaced those serving on the city council at the time of Owen's discharge.

2. The claim for actual reinstatement has been abandoned (but not the backpay element of a reinstatement remedy) because Owen reached the mandatory retirement age of sixty-five during the course of the litigation in district court.

I.

Findings of Fact.

Plaintiff is, and at all times material was, a citizen of the United States and a resident of the State of Missouri.

Defendant City is a municipal corporation organized and existing under the laws of the State of Missouri. The City's government is organized in the council-manager form pursuant to a Missouri Constitutional Home Rule city charter adopted December 5, 1961, and amended April 4, 1972.

Defendant Lyle W. Alberg is the duly appointed and acting City Manager and Chief Administrative Officer of the City.

Defendant Richard A. King is the duly elected and acting Mayor of the City and a member of the City Council. He is the successor of Phil K. Weeks who was, on April 17, 1972, and prior thereto, the City's Mayor.

Defendants Charles E. Cornell, Dr. Ray Williamson, Dr. Duane Holder, Ray A. Heady, Mitzi A. Overman, and E. Lee Comer, Jr., are the duly elected and acting members of the City Council of the City. They are the successors of William A. McGraw, Lauzon H. Maxwell, Arthur W. Lamb, R. M. "Rudy" Bonville, Morris D. McQuinn and Paul L. Roberts who were the members of the City Council on April 17, 1972, and prior thereto.

Under Section 3.3(1) of the City's Charter, the City Manager is vested with the sole power to

> "[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads of administrative departments and all other administrative officers and employees of the city. . . ."

Plaintiff, as Chief of Police, was subject to this provision. The Charter did not provide that the Chief of Police was entitled to any notice of reasons, or a hearing, in connection with the termination of his employment.

The City Council, and its members, are prohibited from influencing, or interfering with in any manner, the City Manager's power of appointment and discharge of City employees. Section 2.11 of the City Charter provides that:

> "[n]either the council, the mayor, nor any of its other members may direct the appointment of any person to, or his removal from office or employment by the city manager or by any other authority, or, except as provided in this charter, participate in any manner in the appointment or removal of officers and employees of the city. Except for the purpose of inquiry, the council, the mayor, and its other members shall deal with the administrative service solely through the city manager. . . . If the mayor or any other councilman violates any provision of this section, he shall be guilty of a misdemeanor, and upon conviction thereof, shall cease to be a councilman. . . ."

On February 20, 1967, plaintiff was appointed Chief of Police of the City for an indefinite term by then City Manager Robert L. Broucek. Prior to that time, he had served as an assistant to the Chief of Police of Kansas City, Missouri. Plaintiff was given no contract of employment, and there was no *de facto* tenure system which would have given him a reasonable or legitimate expectation of continued employment. Plaintiff served as Chief of Police until his employment was terminated effective April 19, 1972, by notice in writing of April 18, 1972, by the present City Manager Lyle W. Alberg.

For a substantial period of time prior to March, 1972, plaintiff and City Manager Albert (sic) had had several sharp disagreements over plaintiff's administration of the Police Department, including but not limited to plaintiff's choice of people for positions in the Department and his administration of the Police Department's property room. In early March, 1972, a handgun, which had been destroyed according to records of the Department's property room, was discovered in the hands of a felon by Kansas City, Missouri, police. In about mid-March, 1972, City Manager Alberg initiated an investigation of the property room of the Police Department initially under plaintiff's direction. Later in March, 1972, Alberg decided that the investigation should be conducted by an independent branch of the city government. He transferred the two police officers who had begun the investigation, Sergeant Robert Jackson and Detective William Reynolds, to the City's Department of Law; and directed City Counselor James S. Cottingham who was head of the Department of Law to supervise the conduct of the investigation and to report the findings of the investigation directly to him.

On or before April 12, 1972, City Manager Albert received copies of statements of witnesses secured in the investigation, and reports from the City Auditor and City Counselor Cottingham. The City Auditor reported that there were insufficient records in the Police Department property room to make an adequate audit of the property in the property room. Cottingham reported in writing to Alberg that there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room.

At an informal meeting with several of the City Council members, which took place on or before April 10, 1972, City Manager Alberg discussed the investi-

gation and told the City Council members that he would take action at an appropriate time to correct any problems in administration of the Police Department disclosed by the investigation. At that time, Alberg intended to keep the witness statements and details of the findings of the investigation confidential.

On April 10, 1972, Alberg communicated by telephone with plaintiff, who was then on vacation in Las Vegas, Nevada. Alberg told plaintiff he was dissatisfied with plaintiff's job performance, and asked plaintiff to resign as Chief of Police and accept another position in the Police Department. He told plaintiff that if he refused to accept another position in the Department, he would be discharged. Plaintiff requested a personal conference with Alberg in Independence the following day.

On April 11, 1972, Alberg and plaintiff met in Alberg's office in Independence. Alberg stated to plaintiff that he was dissatisfied with plaintiff's administration of the Police Department, including plaintiff's lack of supervision over the records section of the Department; the state of those records, and plaintiff's inadequate administration, and lack of control, of the property room which had resulted in the reappearance of supposedly destroyed property in the hands of other people. Alberg again requested plaintiff to resign as Chief of Police, and to accept an advisory position with the Police Department. Plaintiff responded that he was not interested in another position, and that he would fight to remain Chief of Police. Alberg told plaintiff that if he continued to refuse to take another position, his employment with the City would be terminated.

On April 13, 1972, Alberg had a discussion with Lieutenant Lawrence L. Cook of the Police Depart-

ment, during which he asked Cook if he would be willing to take the position of Chief of Police. Cook stated that he would. On the same day, Alberg released a public communication to the Mayor and City Council concerning the investigation and audit of the Police Department's property room, which stated:

> "At my direction, the City Counselor's office, on conjunction with the City Auditor have completed a routine audit of the police property room.
>
> "Discrepancies were found in the administration, handling and security of recovered property. There appears to be no evidence to substantiate any allegations of a criminal nature.
>
> "Steps have been initiated on an administrative level to correct these discrepancies."

Alberg's statement was prominently reported by a local newspaper.

Alberg was away from Independence on the weekend of April 15 and 16, 1972. On April 15, he decided to replace plaintiff with Lieutenant Cook as Chief of Police. However, he did not inform anyone of his decision, and did not take formal action to implement his decision until April 18, 1972.

In Alberg's absence, Assistant City Manager Parley Banks became the Acting City Manager. During the weekend, City Councilman Paul L. Roberts requested copies of the reports of the audit and statements of witnesses secured in the investigation of the Police Department property room. Roberts had recently been defeated for reelection to the City Council, and his term was to expire following the meeting of the City Council on the evening of April 17, 1972. Banks, unaware of Alberg's intention to keep the details of the reports confidential, complied with Roberts' request and delivered the documents to Roberts without reading them.

During the weekend Roberts read the reports and unilaterally decided that their contents should be made public. He secretly drafted a statement to be made by him without prior notice to anyone, at the City Council meeting on the evening of April 17, 1972. The statement is described below.

An informal meeting was held on the morning of April 17, 1972, between Alberg and four members of the City Council, during which the investigation of the Police Department was again discussed. At that time, Alberg did not inform the council members of his intention to discharge plaintiff; and Councilman Roberts did not disclose his intention to make a statement concerning the investigation at the formal meeting of the City Council that evening.

On the evening of April 17, 1972, the City Council held a regularly scheduled meeting. The agenda of the meeting did not list a statement or motion by Councilman Roberts. After completion of the scheduled business, Councilman Roberts read his prepared statement. The statement alleged that plaintiff had taken two television sets from the property room of the Police Department for his own personal use; that numerous firearms in the custody of the Police Department had ". . . found their way into the hands of others including undesirables. . ."; that narcotics being held by the Department ". . . have mysteriously disappeared"; that traffic tickets had been manipulated; that inappropriate requests had been made by "high ranking police officials to the police court"; ". . . that things have occurred causing the unusual release of felons"; and the reports disclosed "gross inefficiencies on the part of a few of the high ranking officers of the police depart-

ment." Councilman Roberts then moved that the reports be made public; that they be turned over to the Prosecuting Attorney of Jackson County; and that the City Council recommend to the City Manager

> ". . . that he should take all direct and appropriate action permitted under the Charter against such persons as are shown by the investigation to have been involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports, and to complete the investigation."

* * * After discussion of Councilman Roberts' motion, six members of the Council voted to approve the motion. Councilman McGraw abstained from voting on the motion.

On April 18, 1972, City Manager Alberg implemented his prior decision to discharge plaintiff as Chief of Police.

> On that day plaintiff received a written notice from Albert stating merely that his employment as Chief of Police was "[t]erminated under the provisions of Section 3.3(1) of the City Charter" effective April 19, 1972. Plaintiff requested that Alberg provide him with written notice of the reasons for the termination and a hearing in a letter to Alberg dated April 15, 1972. The letter was not received by Alberg until after plaintiff's discharge. Both the action of the City Council and plaintiff's discharge by City Manager Alberg were prominently reported in local newspapers.
>
> After termination of plaintiff's employment, Alberg referred the investigation reports and statements to the Prosecuting Attorney of Jackson County, Missouri, for consideration by a grand jury as recommended by the City Council. The grand jury subsequently returned a "no true bill." Since

> that time, neither City Manager Alberg nor the City Council made any further investigation of plaintiff's administration of the Police Department.
>
> In April 1972, plaintiff's attorney requested a hearing on the reasons for plaintiff's discharge. The request was denied by Assistant City Counselor James Gillham by a letter to plaintiff's counsel dated May 3, 1972. [*Owen* v. *City of Independence, Mo.*, 421 F. Supp. 1110, 1113-17 (W.D. Mo. 1976).]

The district court found no causal relationship between councilman Roberts' statement, as supported by the city council's resolution, and the termination of Owen's employment. The record shows, and the district court found, that city manager Alberg did not subscribe to Roberts' accusations and that Alberg publicly stated in his April 13, 1972, report to the city council that, although the investigation uncovered evidence of inefficiency in administration of the police department, no evidence of any criminal activity existed.

The district court also found that when Owen was discharged neither the members of the city council nor the city manager knew that a municipal employee discharged in the face of allegations of improper or immoral conduct was entitled to receive notice of the reasons for discharge and an opportunity to clear his name at a hearing.[3].

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3. As the district court noted:

> The United States Supreme Court first recognized that a public employee, who was discharged under circumstances imposing a "stigma" on his professional reputation and injuring his ability to find employment in the future, was entitled to notice and a hearing to clear his name in *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972). These cases were decided on June 29, 1972, more than two months after plaintiff's discharge. [*Owen* v. *City of Independence, Mo., supra*, 421 F. Supp. at 1118.]

Owen did not join former councilman Roberts in this lawsuit. He did, however, bring an action in the Missouri courts seeking damages for defamation against Roberts and city manager Alberg in their individual capacities. Owen settled and dismissed his case against Roberts, and thereafter also dismissed the state suit against Alberg.

The federal district court determined that Owen's procedural due process claims against the City and its officials for their failure to give Owen a hearing on his discharge could rest directly upon the fourteenth amendment and that Owen could bring such an action in federal court against the City of Independence and its officials in their official capacities under 28 U.S.C. § 1331. The district court determined, however, that the discharge deprived Owen of no property interest in his job because he was an untenured employee, and that the action of the City in discharging Owen did not so stigmatize him as to deprive him of "liberty" protected by the fourteenth amendment. As an alternative ground for denying Owen relief, the district court ruled that the City could assert a qualified immunity based on the good faith exercised by its officials in denying Owen a hearing.[4] The district court found that the City had established this defense because, as we have already noted, on the date of Owen's discharge neither the city manager nor the members of the city council knew that the chief of police, an untenured administrative official of the City, possessed any right to a statement of reasons for his discharge and an opportunity for a hearing to clear his name.

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4. The district court reasoned that the individual officials sued in their official capacities had no greater claim to good faith immunity than the City itself because any award against the officials would be paid from municipal funds. 421 F. Supp at 1123.

The parties present these issues on appeal:

By appellees:

1) That 28 U.S.C. § 1331[5] does not support a claim against the City of Independence and its officials in their official capacities arising directly from the Constitution.[6]

By appellant:

2) That the district court erred in ruling that Owen's discharge did not deprive him of a liberty interest without an opportunity for hearing.

3) That the trial court erred in determining that Owen possessed no job tenure rights under Missouri law and thus suffered no deprivation of property when discharged.

4) That the trial court erred in applying a good faith defense to claims against the City and its agents in their official capacities. In this regard, appellant particularly notes that good faith does not bar equitable relief which ordinarily includes backpay as an incident of reinstatement.

We turn to a consideration of these issues.

---

5. That section in relevant part reads:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

6. Appellees phrase the issue in terms of subject matter jurisdiction. Properly viewed, however, the issue is whether Owen has stated a claim. Clearly, Owen's claim "arises under" the Constitution or laws of the United States, and is not completely baseless or plainly foreclosed by prior decisions. Thus, 28 U.S.C. § 1331 affords a federal district court subject matter jurisdiction over cases such as this one. *See, e.g., Mt. Healthy City School Dist. Bd. of Ed.* v. *Doyle*, 97 S. Ct. 568, 572 (1977); *Bell* v. *Hood*, 327 U.S. 678 (1946).

I. *Right of Action Against the City.*

Assuming a constitutional violation, the City and its agents in their official capacities contend that federal law precludes any monetary award which must be satisfied by the City.

Although Owen's complaint alleges jurisdiction under 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1983 (as well as 28 U.S.C. § 1331), it is clear that no action lies against the municipality under sections 1343(3) and (4) and 1983, because the City is not a "person" within the meaning of section 1983. *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973); *Monroe* v. *Pape,* 365 U.S. 167 (1961). Owen asserts, however, that his claim to retrospective monetary relief is not barred under either of two theories: (1) the individual defendants, in their official capacities, may be ordered under section 1983 to grant Owen a hearing and backpay from city funds under their control; or (2) the City is subject to suit for reinstatement and backpay under an implied right of action arising directly from the fourteenth amendment, and the district court possessed subject matter jurisdiction over that claim under 28 U.S.C. § 1331.

The individual defendants are, both in their official and individual capacities, "persons" under section 1983, subject to federal suits in equity to remedy unconstitutional behavior. It is also true that in section 1983 actions against government administrators, monetary relief in the form of backpay to be awarded from public funds under the defendants' control may be awarded as part of an equitable decree. *See, e.g., Wellner* v. *Minnesota State Junior College Board,* 487 F.2d 153, 156-57 (8th Cir. 1973); *Cooley* v. *Board of Education of Forrest City School Dist.,* 453 F.2d 282 (8th Cir. 1972). Owen argues that he may recover backpay from the individual appellees in their official capacities as part of general equitable relief, even though the backpay

award would be paid by the City, which could not be held directly liable for backpay under section 1983, because it is not a "person" within the meaning of section 1983. This position has some support. *See, e.g., Lytle* v. *Commissioners of Election of Union County,* 541 F.2d 421, 426 (4th Cir. 1976), *pet. for cert. filed,* 44 U.S.L.W. 3739 (U.S. June 22, 1976); *Burt* v. *Board of Trustees of Edgefield County School Dist.,* 521 F.2d 1201, 1205-06 (4th Cir. 1975); *Incarcerated Men of Allen County Jail* v. *Fair,* 507 F.2d 281, 288 (6th Cir. 1974); *Dyson* v. *Lavery,* 417 F. Supp. 103, 109 (E.D. Va. 1976); *Adamian* v. *University of Nevada,* 359 F.2d 825 (D. Nev. 1973), *rev'd on other grounds sub nom. Adamian* v. *Jacobsen,* 523 F.2d 929 (9th Cir. 1975); *Developments in the Law: Section 1983 and Federalism,* 90 Harv. L. Rev. 1133, 1197-99 (1977).

Other courts have rejected this theory, however. They argue that a monetary award under section 1983, even if made part of equitable relief ordered in a suit against a city official, is really a judgment against the city, if the award is to be satisfied from city funds, and is therefore barred by *City of Kenosha* v. *Bruno, supra,* and *Monroe* v. *Pape, supra.* These cases draw an analogy to *Edelman* v. *Jordan,* 415 U.S. 651 (1974), which held that a request for retroactive welfare benefits, even if entitled "equitable restitution" and made part of an equitable decree in a suit against a state official, is in reality a suit against the state barred by the eleventh amendment if the retroactive benefits are to be paid from the state treasury. *See, e.g., Monell* v. *Department of Social Services of City of New York,* 532 F.2d 259, 264-67 (2d Cir. 1976), *cert. granted,* ..... U.S. ....., 97 S. Ct. 807 (1977) (No. 75-1914); *Muzquiz* v. *City of San Antonio,* 528 F.2d 499 (5th Cir. 1976) (*en banc*), *pet. for cert. filed,* 44 U.S.L.W. 3703 (U.S. May 23, 1976) (No. 75-1723); *Patton* v. *Conrad Area School Dist.,* 388 F. Supp. 410

(D. Del. 1975).[7] This analogy is criticized in *Developments in the Law: Section 1983 and Federalism, supra,* 90 Harv. L. Rev. at 1198-99.

However, we need not choose between the conflicting approaches to Owen's claims that he may obtain monetary relief from the City through the individual city officials in their official capacities under section 1983, because we are convinced that Owen has established a claim on his second theory, that of an implied right of action arising from the Constitution itself.

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), clearly recognized that a federal "court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies" to vindicate rights arising from positive law, such as the Constitution, without express congressional authorization. 403 U.S. at 408 n.8 (Harlan, J., concurring). We are confronted with the fundamental questions of whether the remedies Owen seeks against the City of Independence are available as "necessary" or "appropriate" to the vindication of fourteenth amendment values, *see Bivens, supra,* 403 U.S. at 397; *id.* at 406 (Harlan, J., concurring), and whether Congress has expressly decided that a person injured by a municipal violation of the Constitution may not recover money from the city but must be

7. These holdings are not necessarily inconsistent with our cases awarding backpay to be paid by school districts, *e.g., Wellner* v. *Minnesota State Junior College Bd., supra,* 487 F.2d 153; *Cooley* v. *Board of Educ. of Forrest City School Dist., supra,* 453 F.2d 282. The parties in these cases did not question the school boards' status as "persons" under section 1983. In at least one case, we have assumed that school boards are "persons" suable under section 1983, *Keckeisen* v. *Independent School District 612,* 509 F.2d 1062, 1064-65 (8th Cir.), *cert. denied,* 423 U.S. 833 (1975).

limited to remedies against others specifically provided by Congress, *Bivens, supra,* 403 U.S. at 397.

Some courts have held that municipal immunity from suit under section 1983 necessarily indicates that Congress intended to immunize local government units from monetary liability under 28 U.S.C. §1331 and the fourteenth amendment. *See, e.g., Raffety* v. *Prince George's County,* 423 F. Supp. 1045 (D. Md. 1976); *Farnsworth* v. *Orem City,* 421 F. Supp. 830 (D. Utah 1976); *Pitrone* v. *Mercadante,* 420 F. Supp. 1384 (E.D. Pa. 1976); *Turano* v. *Board of Educ. of Island Trees Union Free School Dist. No. 26,* 411 F. Supp. 205 (E.D. N.Y. 1976); *Mitchell* v. *Libby,* 409 F. Supp. 1098 (D. Vt. 1976); *Snead* v. *Department of Social Services of City of N.Y.,* 409 F. Supp. 995, 1001-02 (S.D. N.Y. 1975) (three-judge court) (Mulligan, J., concurring); *Weathers* v. *West Yuma County School Dist. R-J-1,* 387 F. Supp. 552 (D. Colo. 1974), *aff'd,* 530 F.2d 1335 (10th Cir. 1976); *Smetanka* v. *Bourough of Ambridge,* 378 F. Supp. 1366 (W.D. Pa. 1974); *Perzanowski* v. *Salvio,* 369 F. Supp. 223 (D. Conn. 1974). The Supreme Court has not expressly resolved the issue. *See, e.g., Mt. Healthy City School Dist. Bd. of Education* v. *Doyle,* 97 S. Ct. 568, 571 (1977); *Aldinger* v. *Howard,* 427 U.S. 1, 4 n.3 (1976). However, the Supreme Court may well have already rejected local governmental immunity under section 1983 as a basis for disallowing an implied right of action against local governments under the fourteenth amendment. In *City of Kenosha* v. *Bruno, supra,* the Supreme Court held that section 1983 does not permit equitable relief against a city, but remanded the case to the district court to determine whether the prerequisites for general federal question jurisdiction under 28 U.S.C. §1331 were met and for reconsideration of the merits in light of several intervening decisions. *See* 412 U.S. at 514, 515. Against the City of

Kenosha, the issues on the merits could only be considered if there were an implied right of action against the city, because relief was unavailable under section 1983. The Supreme Court apparently did not view section 1983 as limiting the power of federal courts to imply remedies from the Constitution against a municipal corporation such as the City of Kenosha. *See City of Kenosha* v. *Bruno, supra,* 412 U.S. at 516 (Brennan, J., concurring); *Hostrop* v. *Board of Junior College District No. 515,* 523 F.2d 569, 577 (7th Cir. 1975), *cert. denied,* 425 U.S. 963 (1976); *Dahl* v. *City of Palo Alto,* 372 F. Supp. 647, 650 (N.D. Cal. 1974); Note, *Damage Remedies Against Municipalities For Constitutional Violations,* 89 Harv. L. Rev. 922, 941-42 (1976) (hereafter cited as Note, *Damage Remedies*). *But see Pitrone* v. *Mercadante,* 420 F. Supp. 1384, 1388 (E.D. Pa. 1976).

The majority of those courts considering these issues have concluded that monetary relief such as backpay may be awarded against local governmental entities on a *Bivens* theory, even though those governmental units are immune from section 1983 liability, and that such a remedy is an appropriate one to vindicate constitutional rights in proper cases.[8] Thus, we agree with the district court, 421 F. Supp. at 1119, that Owen may assert a claim for monetary relief under the fourteenth amendment against the City of Independence.[9] *See Stapp* v. *Avoyelles Parish School Bd.,*

8. As explained in the section of this opinion dealing with the remedy to be awarded Owen, *infra,* monetary relief in the nature of backpay is an "ordinary" or "necessary" remedy for the unlawful discharge of a public employee.

9. We emphasize that, given the facts of this case, we discuss only an equitable remedy, which may include backpay, for an illegally discharged public employee. We do not intend to imply that municipalities are monetarily liable for each and every constitutional violation committed by their agents. For example, cases such as *Adekalu* v. *New York City,* 431 F. Supp. 812 (S.D.

(*Continued on following page*)

545 F.2d 527, 531 n.7 (5th Cir. 1977); *Amen* v. *City of Dearborn,* 532 F.2d 554, 559 (6th Cir. 1976); *Reeves* v. *City of Jackson, Ms.,* 532 F.2d 491, 495 (5th Cir. 1976); *Cox* v. *Stanton,* 529 F.2d 47 (4th Cir. 1975); *Brault* v. *Town of Milton,* 527 F.2d 730 (2d Cir.), *rev'd on other grounds, id. at* 736 (2d Cir. 1975) (*en banc*); *Hostrop* v. *Board of Junior College District No. 515, supra,* 523 F.2d 569; *Gray* v. *Union County Intermediate Education District,* 520 F.2d 803, 805 (9th Cir. 1975); *Calvin* v. *Conlisk,* 520 F.2d 1 (7th Cir. 1975), *vacated and remanded on other grounds,* 424 U.S. 902, *cert. denied sub nom. Afro-American Patrolmen's League* v. *Conlisk,* 424 U.S. 912 (1976); *Hanna* v. *Drobnick,* 514 F.2d 393 (6th Cir. 1975); *Skehan* v. *Board of Trustees of Bloomsburg State College,* 501 F.2d 31, 41-44 (3d Cir. 1974), *vacated and remanded on other grounds,* 421 U.S. 983 (1975); *Adekalu* v. *New York City,* 431 F. Supp. 812 (S.D. N.Y. 1977); *Sedule* v. *Capital School Dist.,* 425 F. Supp. 552 (D. Del. 1976); *Sanabria* v. *Village of Monticello,* 424 F. Supp. 402 (S.D. N.Y. 1976); *Sixth Camden Corp.* v. *Township of Evesham,* 420 F. Supp. 709 (D. N.J. 1976); *Behan* v. *City of Dover,* 419 F. Supp. 502 (D. Del. 1976); *Sheets* v. *Stanley Community School Dist. No. 2,* 413 F. Supp. 350, 351 (D. N.D. 1975), *aff'd,* 532 F.2d 111 (8th Cir. 1976); *Demkowicz* v. *Endry,* 411 F. Supp. 1184 (S.D. Ohio 1975); *Collum* v. *Yurkovich,* 409 F. Supp. 557 (N.D. Ill. 1975); *Panzarella* v. *Boyle,* 406 F. Supp. 787 (D. R.I. 1975); *Williams* v. *Brown,* 398 F. Supp. 155 (N.D. Ill. 1975); *Everett* v. *City of Chester,*

Footnote continued—

N.Y. 1977); *Crosley* v. *Davis,* 426 F. Supp. 389 (E.D. Pa. 1977), and *Gresham* v. *City of Chicago,* 405 F. Supp. 410 (N.D. Ill. 1975), which refused to hold cities liable on a *Bivens* theory for brutality, false arrest and imprisonment, and unlawful search and seizure committed by individual police officers, absent proof that the cities' policy-making agencies or officials knowingly encouraged or tolerated such conduct, involve considerations of vicarious liability not present in this case where the conduct of the city's highest ranking officials allegedly resulted in the constitutional violation.

391 F. Supp. 26 (E.D. Pa. 1975); *Dahl* v. *City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974).

The City also suggests in its brief that the Missouri rule of sovereign immunity for municipalities shields it from liability. The short answer to this contention is that this case presents a federal question in which state law does not control. As indicated in our discussion of remedies, *infra*, backpay is an appropriate remedy to vindicate the federal rights of illegally discharged public employees such as Owen, and contrary state immunity defenses cannot, consistent with the Supremacy Clause, protect the City. *Hampton* v. *City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); *Sullivan* v. *Murphy*, 478 F.2d 938, 972 (D.C. Cir), *cert denied*, 414 U.S. 880 (1973); *Maybanks* v. *Ingraham*, 378 F. Supp. 913, 916 n.2 (E.D. Pa. 1974); Note, *Damage Remedies, supra*, 89 Harv. L. Rev. at 955-56.

II.

The Liberty Interest.

Despite the obviously derogatory and stigmatizing nature of Robert's statement on April 17, 1972 (one day preceding the actual discharge), the district court held that Owen had not been deprived of a constitutionally protected interest in liberty,[10] relying on three arguments. First, the

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10. The text of Roberts' statement, which is reproduced in full at 421 F. Supp. 1116 n.2, in part recites:

> On Saturday, April 15th for the first time I was able to see these 27 voluminous reports. The contents of these reports are astoundingly shocking and virtually unbelievable. They deal with the disappearance of 2 or more television sets from the police department and signed statement that they were taken by the Chief of Police for his own personal use.
>
> "The reports show that numerous firearms properly in the police department custody found their way into the

(*Continued on following page*)

district court reasoned that the only official reason for Owen's discharge by the city manager, the official with sole power to discharge the chief of police, was that Owen was "[t]erminated under the provisions of Section 3.3(1) of the City Charter [,]" which provided for discharge merely for the "good of the service." Thus, according to the district court, there exist no statements in Owen's official record which could possibly stigmatize Owen. 421 F. Supp. at 1121.

Secondly, the district court determined that there was no "causal connection" between Owen's discharge and the statement made by councilman Roberts and the actions taken by the city council. The court pointed out that before the council meeting of April 17, 1972, city manager Alberg had already decided to discharge Owen. Moreover, the city council and its members were prohibited by the city charter to attempt to influence the city manager's decision regarding hiring and firing of employees. *See* 421 F. Supp. at 1121.

Thirdly, the district court reasoned, 421 F. Supp. at 1121-22, that Owen was completely exonerated from any charges of criminal or immoral conduct by the city counselor's and city manager's pre-April 17th statements that the investigation had uncovered no evidence of illegal con-

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Footnote continued—

> hands of others including undesirables and were later found by other law enforcement agencies.
>
> "Reports whow (sic) that narcotics held by the Independence, Missouri Chief of Police have mysteriously disappeared. Reports also indicate money has mysteriously disappeared. Reports show that traffic tickets have been manipulated. The reports show inappropriate requests affecting the police court have come from high ranking police officials. Reports indicate that things have occurred causing the unusual release of felons. The reports show gross inefficiencies on the part of a few of the high ranking officers of the police department. [*Owen* v. *City of Independence, Mo.*, 421 F. Supp. 1110, 1116 n.2 (1976).]

duct in the police department, and by the county grand jury's subsequent return of a "no true bill."

We disagree. In determining whether a government employer has deprived its employee of a liberty interest in the termination of employment, the crucial issue is whether the government employer, in connection with the termination of government employment, including a refusal to rehire or reemploy, makes a charge which might seriously damage the employee's standing and reputation in the community. *Bishop* v. *Wood,* 426 U.S. 341 (1976); *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972). *Compare Codd* v. *Velger,* ..... U.S. ....., 97 S.Ct. 882 (1977); *Paul* v. *Davis,* 424 U.S. 693, 708-710 (1976); *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971).

The elements of a claim for deprivation of liberty on the part of a public employee, first enunciated by the Court in *Roth,* have been clarified in *Bishop* and *Codd,* as well as in the related case of *Paul* v. *Davis, supra.* In *Bishop, supra,* the city manager on recommendation of the police chief discharged a policeman for reasons of conduct "unsuited to an officer." 426 U.S. at 343. In addressing the liberty claim, Mr. Justice Stevens, writing for the majority, made reference to the elements necessary to establish the claim, *i.e.,* that the reasons given for the discharge may severely damage the employee's reputation in the community and that the employee claims those reasons were false. *Id.* at 347. In that case, petitioner could not establish his right to recovery because the city did not publicly disclose the asserted reasons for the discharge decision.

In *Codd* v. *Velger, supra,* Velger complained that he had been wrongly dismissed as a New York policeman without a hearing or statement of reasons. A potential employer in examining Velger's personnel file " 'gleaned

that plaintiff [Velger] had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt.' " 97 S.Ct. at 883, *quoting* the findings of the district court. The Court held that policeman Velger did not state a claim because the record disclosed that he had failed to allege the falsity of the stated reasons for the dismissal. Thus, a hearing could clear his name.

The *Velger* Court explained as follows:

> Assuming all of the other elements necessary to make out a claim of stigmatization under *Roth* and *Bishop,* the remedy mandated by the Due Process Clause of the Fourteenth Amendment is "an opportunity to refute the charge." 408 U.S., at 573, 92 S.Ct. at 2707. "The purpose of such notice and hearing is to provide the person an opportunity to clear his name," *id.,* n. 12. But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation.
>
> * * *
>
> But the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely "to provide the person an opportunity to clear his name." If he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him. For the contemplated hearing does not embrace any determination analogous to the "second step" of the parole revocation proceeding, which would in effect be a determination of whether or not, conceding that the report were true,

the employee was properly refused re-employment. Since the District Court found that respondent had no Fourteenth Amendment property interest in continued employment, the adequacy or even the existence of reasons for failing to rehire him presents no federal constitutional question. Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required. *Roth, supra*; *Bishop, supra*. [*Id.* at 883-84 (footnote omitted).]

In *Paul* v. *Davis, supra,* Davis complained that a defamatory flyer issued by the chief of police of Louisville, naming Davis as an active shoplifter, deprived the complainant of "liberty" or "property" secured against state deprivation by the Due Process Clause. The Court, although rejecting the claim that an interest in one's reputation alone is protected by the Due Process Clause, reaffirmed its decision in *Board of Regents* v. *Roth,* 408 U.S. 564 (1972), with the following language:

> Thus it was not thought sufficient to establish a claim under § 1983 and the Fourteenth Amendment that there simply be defamation by a state official; *the defamation had to occur in the course of the termination of employment.* Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time the *State in its capacity as employer* might be considered responsible for a statement defaming an employee who continues to be an employee. [424 U.S. At 710 (emphasis added).]

The district court in finding no stigma focused upon the nondefamatory legal justification for Owen's discharge given by the city manager in the discharge notice. That notice by itself did not cast a stigma upon Owen. But

Roberts, in his capacity as a city councilman, released to the public and to the press a statement impugning Owen's honesty and integrity. This statement, allegedly false, was made at an official meeting of the city council. The city council itself appeared to lend support to Roberts' charges by resolving that the investigative reports be referred to the county prosecutor for presentation to the grand jury. Newspapers prominently reported Roberts' statement and the city council resolution. Owen's discharge followed immediately after the April 17, 1972 meeting. The city manager notified Owen of his discharge, citing no reasons for the discharge, but referring only to provisions of section 3.3(1) of the city charter. The fact of the discharge, Roberts' statement, and the council action received great publicity, and the newspapers linked the discharge to the investigation.[11]

The fact of actual stigma to Owen *connected with his discharge* is undeniable, for the action of the City of Independence as employer served to blacken Owen's name and reputation. That the stigmatizing charges did

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11. A lead article in the Independence, Missouri, *Examiner* for April 18, 1972, reported:

> The dismissal of the 35-year veteran police officer came on the heels of a massive police department audit of the property room and investigation into other areas of the department.
>
> The reports of that investigation were delivered to J. D. Williamson, an assistant Jackson County prosecutor, late Tuesday by one of the report investigators, Sgt. Robert Jackson.
>
> Lyle Alberg, city manager, made no comment on the firing but did name Lt. Lawrence Cook, a ten-year veteran of the department, as the new chief. Cook began his new duties today.

While city manager Alberg did not subscribe to councilman Roberts' derogatory remarks about Owen, his later public announcement that he was referring the investigative reports to the county attorney for submission to the grand jury did reinforce the city council's implication of wrongdoing against Owen.

not come from the city manager and were not included in the discharge notice is immaterial, because the official actions of the city council released charges against Owen contemporaneous and, in the eyes of the public, connected with that discharge. It is the fact of the City's public accusation which is of prime importance, not which official made the accusation. *See Cox* v. *Northern Virginia Transportation Commission*, 551 F.2d 555, 558 (4th Cir. 1976); *Churchwell* v. *United States*, 545 F.2d 59 (8th Cir. 1976); *Greenhill* v. *Bailey*, 519 F.2d 5 (8th Cir. 1975); *Birnbaum* v. *Trussell*, 371 F.2d 672 (2d Cir. 1966).

Finally, the secret deliberations of a grand jury cannot be deemed exoneration for one stigmatized in his employment or the equivalent to the due process right of an employee subject to dismissal to attempt to "clear his name" in hearings which can be open to the public. *See Codd* v. *Velger*, 97 S.Ct. at 883-84.

Accordingly, we hold that the action of the City of Independence deprived Owen of liberty without due process of law, in violation of Owen's rights under the fourteenth amendment.

III.

Property Interest.

The city charter of Independence provides in section 3.3(1) that a department head, such as the chief of police, may be removed by the city manager only "when deemed necessary for the good of the service." Owen contends here, as he did in the district court, that this city charter provision granted him a continuing contract as police chief, subject only to termination for cause. Therefore, he claims the protections of procedural due process in termination. The city charter makes no express provision for a termination hearing for department heads, but it also does not expressly deny that right.

Appellant relies principally on *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). In that case, a federal employee, Kennedy, attacked the discharge procedures under the Lloyd-LaFollette Act, 5 U.S.C. § 7501, and attendant regulations, which did not extend to nonprobationary federal employees such as Kennedy the right to a full trial-type hearing before removal. Although the Supreme Court in a divided series of opinions rejected Kennedy's claim, six of the nine justices agreed that Kennedy's government employment was one which could be terminated only for cause, i.e., "such cause as will promote the efficiency of the service," 5 U.S.C. § 7501(a), and that such statutory language created a property interest in employment, entitling the employee to some form of a due process hearing prior to discharge.

Subsequently, in *Bishop* v. *Wood*, 426 U.S. 341 (1976), the Court considered the case of a Marion, North Carolina, police officer, who was classified as a permanent employee and covered by provisions of an ordinance which specified that an employee might be discharged if he failed "to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties * * *." *Id.* at 344 n.5. The Court rejected Bishop's claims to a property interest in his job because North Carolina precedent supported the lower court's conclusion that despite the language of the ordinance quoted above, that ordinance granted no right to continued employment, but merely conditioned an employee's removal upon compliance with certain specified procedures. *Id.* at 345. Thus, *Bishop* teaches that the Supreme Court's interpretation of a federal statute does not control the interpretation of similarly worded state laws.

While some of the Missouri cases which interpret statutes allowing discharge of public employees "for the good of the service." appear to support Owen's position, *see State ex rel. Reid* v. *Walbridge,* 119 Mo. 383, 24 S.W. 457 (1893); *State ex rel. Denison* v. *City of St. Louis,* 90 Mo. 19, 1 S.W. 757 (1886); *State ex rel. Eckles* v. *Kansas City,* 257 S.W. 197, 200-01 (Mo.App. 1923); *see also Friedman* v. *Miller,* 525 S.W.2d 770, 772 (Mo.App. 1975), the state supreme court's opinion in *State* v. *Crandall,* 269 Mo. 44, 190 S.W. 889 (1916) (*en banc*) supports the position of the appellee that Owen possessed no property interest in his job. The state court there said:

> [W]here the power to remove is given, expressly or by necessary implication, in the Enabling Act, by words or terms denoting that it may be exercised in discretion, such power, to the extent thus given, is ex hypothesi, one which may be exercised whenever in the mind and judgment of the donee of the power the fact or thing exists upon which his discretion is rested. In the case at bar the statute in express terms tells the Governor to remove any commissioner "upon his being fully satisfied" of "the alleged official misconduct" of such commissioner. It therefore falls within the exact terms of the proposition last stated* * *. [190 S.W. at 891.]

The provision of the charter which authorizes the city manager to "[a]ppoint, and *when deemed* necessary for the good of the service * * * remove all directors or heads of administrative departments" may be fairly interpreted as conferring upon the city manager the power to remove such officers at will. [Emphasis added]. The city manager's power to discharge seems analogous to that of the governor in *Crandall,* who could discharge "upon his being fully satisfied" that there was misconduct. Under

Missouri law, such language confers the power to discharge at will.

The district court determined that under the home rule provisions of the Missouri Constitution, the applicable law is the charter of the City of Independence. The court construed that charter not to provide rights to a notice and hearing for an employee who is an administrative department head such as Owen, and responded to appellant's argument that he was entitled to a hearing with this language:

> Plaintiff argues that in spite of the fact that heads of administrative departments are not *expressly* accorded rights to notice and a hearing, such rights are to be *implied* from the fact that heads of administrative departments were made dischargeable only "when necessary for the good of the service." However, from Sections 3.28 and 3.1 of the Charter, it is clear that the drafters of the Charter knew how to expressly provide for rights to notice and a hearing when such rights were intended. In view of the express provision of such rights to other employees, it is unlikely that the drafters intended to accord heads of administrative departments such rights by implication through use of the phrase "for the good of the service." Rather the absence of an express provision of such rights is persuasive evidence that no such rights were intended to exist. [421 F. Supp. at 1125.]

We can find no specific Missouri case law to the contrary. While the question is one not entirely free from doubt, under these circumstances we are required to give great weight to the views of the district judge, who is familiar with the local law. *See Merchants Mutual Bonding Co.* v. *Appalachian Ins. Co.,* No. 76-1334 (8th Cir., June 16, 1977); *Rodeway Inns of America, Inc.* v. *Frank,* 541 F.2d 759,

767 (8th Cir. 1976), *cert. denied*, ... U.S. ....., 97 S.Ct. 1580 (1977); *Luke* v. *American Family Mut. Ins. Co.*, 476 F.2d 1015 (8th Cir.) (*en banc*), *cert. denied*, 414 U.S. 856 (1973).

Accordingly, we reject Owen's contention that he possessed a property interest in continued employment as chief of police of the City of Independence.

IV.

Remedy.

We held in *Wellner* v. *Minnesota State Jr. College*, 487 F.2d 153 (8th Cir. 1973), that when an untenured employee of a state agency is, upon discharge, stigmatized by the release of defamatory information by his employer and denied the right to clear his name in a public hearing, that employee is entitled to judgment including lost wages, but not actual reinstatement.[12] In that case we said:

> Wellner [the state employee] was improperly discharged because he was not accorded an appropriate hearing. His termination was therefore a nullity and he remains on the payroll until a proper hearing is held, at which time he may be retained or not reappointed. It is not within our province to speculate that after a proper hearing clearing his reputation the Board will recommend that Wellner not be reappointed, or that the appropriate official will not reappoint him to a similar teaching position. In any event, Wellner remains on the payroll and is entitled to receive the wages he will have earned until his name is cleared by proper Board action and the decision is properly made with respect to whether he will be reappointed. [487 F.2d at 157.]

12. The court majority in *Bishop* v. *Wood*, *supra*, 426 U.S. 341, commented that

> [t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United State Constitution cannot feasibly be construed to require federal judicial review for every such error. [*Id.* at 349-50 (footnote omitted).]

Footnote 14 at p. 349 adds, in part:

> The fact of the matter, however, is that the instances in which the federal judiciary has required a state agency to reinstate a discharged employee for failure to provide a pretermination hearing are extremely rare.

As we have noted, Owen's age bars him from qualifying to serve further as chief of police, so vindication of his good name could not restore Owen to this job at this time. Moreover, in light of the findings by the district court that the city manager, prior to April 17, 1972, had decided to discharge plaintiff for reasons which apparently did not relate to Owen's honesty or integrity, a full back-pay remedy would afford Owen a windfall at the expense of the municipality and the municipal taxpayers. A person deprived of constitutional rights by the Government is entitled to relief only to the extent of the harm sustained, *Codd* v. *Velger*, *supra*, 97 S.Ct. at 884; to the extent that the constitutional violation causes no injury, no remedy is called for, *Mt. Healthy City School District* v. *Doyle*, *supra*, 97 S.Ct. at 575. Thus, in its remedial aspects, this case can be distinguished from *Wellner*, for there one could not say whether or not the discharged employee would have retained his job after a public hearing.

However, merely to order that the City now give Owen a hearing would amount to no relief at all. Although Owen would not have remained chief of police even after a hearing, it seems likely that he was still employable in the law enforcement field and that Roberts' charges adversely affected Owen's employability. The rec-

ord discloses that the city manager did offer Owen a different position with the City when Owen's resignation was demanded. In addition, he did work at some other security jobs during the period between his discharge and the time when he would have retired. However, the record shows that Owen sought other similar employment opportunities and that at least one such opportunity was denied him because of the adverse publicity surrounding his discharge. We believe some amount of compensatory relief is appropriate here. The present record[13] can furnish an adequate basis for the district court to determine the proper amount of compensation, measured by the amount of money he likely would have earned to retirement if he had not been deprived of his good name by the action of the City, subject to mitigation, including the amounts earned up to retirement age as well as the amount, if any, recovered from councilman Roberts in the state defamation suit.

The award against the municipality here, while not strictly backpay is in lieu of backpay and represents a form of equitable relief, because, as explained in the *Wellner* case, Owen's termination without an appropriate hearing must be deemed a nullity; he remains on the payroll and is entitled to backpay. As we have noted, however, he is not entitled to a windfall.

V.

Good Faith Defense.

The good faith of the municipality does not constitute a defense to exaction of monetary relief as an element

13. At the district court's discretion, it may permit the parties to supplement the record by such additional evidence as may be available bearing upon Owen's likely earnings to retirement in the absence of his being deprived of his good name.

of equitable relief. Backpay has been often considered an incident to equitable relief. *See NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937); *Harkless* v. *Sweeny Independent School Dist.*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971).

In making available to the City the defense of good faith, the district court relied on the elements of that defense applied in section 1983 actions against state officials, as enunciated in *Wood* v. *Strickland*, 420 U.S. 308, 319-21 (1975), and *Scheuer* v. *Rhodes*, 416 U.S. 232, 241-42 (1974). *Wood* v. *Strickland* notes that "immunity from damages does not ordinarily bar equitable relief as well." 420 U.S. at 314-15 n. 6. To the extent that backpay or a lesser equivalent qualifies as equitable relief, the immunity ruling of the *Wood* case ought not to apply.

Moreover, the primary justification for the defense of good faith in *Wood*, to insure that public officials will not hesitate to discharge their duties out of fear of personal monetary liability, *see* 420 U.S. 319-21, does not exist where the city itself will bear the monetary award. In *Hander* v. *San Jacinto Junior College*, 519 F.2d 273, *rehearing denied*, 522 F.2d 204 (5th Cir. 1975), which involved an illegally discharged college professor, the court refused to apply the immunity rule of *Wood* v. *Strickland*, stating:

> The *Wood* rationale, however, is inapplicable to the instant case because the backpay award is entered against San Jacinto Junior College itself and not against the individual members of the Board of Regents. [519 F.2d at 277 n. 1.]

See also Developments in the Law: Section 1983 and Federalism, supra, 90 Harv. L.Rev. at 1217-20; Note, *Damages Remedies*, 89 Harv. L.Rev. at 955-58.

In addition to the *Wellner* case previously cited, this court in *Cooley* v. *Board of Educ. of Forrest City School Dist.*, 453 F.2d 282, 287 (8th Cir. 1972), awarded backpay against a school board in favor of an unconstitutionally discharged schoolteacher. Although *Wellner* and *Cooley* arose under section 1983, the backpay liability was assessed against the school officials in their official capacities and constituted an obligation of the school districts themselves, not the individual defendants. If equitable relief will be against a school board without regard to the board's good faith as it did in *Wellner* and *Cooley*, we perceive no reason to extend a qualified good faith immunity to a city which has inflicted similar injury to an employee's reputation in the course of discharging that employee.

Whether good faith may be a defense to a municipality in an action for damages apart and aside from backpay or its equivalent, *see, e.g., Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F.2d 569, 579 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976) (damages for violation of intangible constitutional rights) is a matter which we do not address in this opinion.

Finally, in determining that the city officials acted in good faith, the district court focused upon the City's failure to give Owen a hearing. The city manager and the members of the city council, except councilman Roberts, all testified and asserted that they did not know in April 1972, that an employee in Owen's position was entitled to a hearing, and testified further that their actions arose from a good faith belief that the public was entitled to know the results of the investigation. The fact of the matter is that the results of the investigation were never made public. Councilman Roberts, however, made statements at an official meeting of the city council implying that the investigation showed the chief of police to have

been guilty of criminal conduct, without giving the accused person an opportunity to respond or to defend himself. It is Roberts' allegedly false accusation which damaged Owen's reputation and future employment prospects. The city officials may have acted in good faith in refusing the hearing, but lack of good faith is evidenced by the nature of the unfair attack made upon the appellant by Roberts in the official conduct of the City's business. The district court did not address the good faith defense in light of Roberts' defamatory remarks.

In any event, however, we hold the good faith defense unavailable as a matter of law in cases involving claims for backpay and similar equitable remedies which will be borne by a unit of government and not individual office holders.

VI.

Conclusion.

It follows from the foregoing discussion that, in addition to some compensatory relief, Owen is entitled to a declaratory judgment that his discharge from employment deprived him of constitutionally protected liberty without due process of law.

Accordingly, we reverse the judgment and remand this case to the district court for entry of the declaratory judgment and an award of compensatory relief consistent with this opinion.

VAN OOSTERHOUT, Senior Circuit Judge, dissenting.

The issue of whether an action against a city and its officers can be instituted directly under the fourteenth amendment and 28 U.S.C. §1331 is a close one on which, as noted by majority, the courts are divided. The issue

is one which "has never been decided by [the Supreme Court]." *Mt. Healthy Bd. of Educ.* v. *Doyle,* ..... U.S. ....., 45 U.S.L.W. 4079, 4080 (Jan. 11, 1977). Since in my opinion plaintiff cannot recover on the merits, I will assume for the purpose of this case, without so concluding, that the majority has correctly resolved this issue. I accordingly do not dissent from the dismissal of the cross-appeal.

I agree with the majority that the plaintiff was an untenured employee and that he had no property interest in his position.

My point of departure is on the majority's holding that plaintiff was deprived of a liberty interest without a hearing and in particular on the majority's conclusion that the stigma to Owen was "connected with his discharge". That this conclusion is essential to the result reached by the majority is clear. In *Paul* v. *Davis,* 424 U.S. 693 (1976), city police had furnished a list of shoplifters to local merchants for the purpose of assisting them in preventing shoplifting. Plaintiff, whose name appeared on the list, had been charged with shoplifting but had not been tried when the list was provided. On the liberty issue the Court holds:

> The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself

> sufficient to invoke the procedural protection of the Due Process Clause.
>
> * * *
>
> While not in uniform in their treatment of the subject, we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.
>
> * * *
>
> Thus it was not thought sufficient to establish a claim under §1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment.

Id. at 701, 702, 710.

As set out in the trial court's findings of fact incorporated in the majority opinion, the city manager had exclusive jurisdiction to hire and fire city employees. The chief of police was subject to this provision. The city charter specifically prohibits the mayor or council from interfering with the appointment or discharge of any officer, such as the chief of police. Violation constitutes a misdemeanor and grounds for removal from office upon conviction.

On April 10, 1972, the city manager, being dissatisfied with the work of the chief of police, requested the chief to resign and accept another position in the police department, which plaintiff refused to do. On April 13, the city manager obtained the consent of one Cook to serve as police chief. On April 18, plaintiff was formally advised of his discharge.

The majority agrees with the district court's determination that no stigma attached to the nondefamatory discharge notice given by the city manager. The defamation made was contained in information released by councilman Roberts at an April 17 council meeting. Neither the mayor nor the council had any voice in plaintiff's discharge. Plaintiff had been fully advised on April 10 and 11 that he would be discharged if he did not resign and arrangements for a successor were made on April 13 by the city manager, all prior to the April 17 council meeting.

I readily acknowledge that "official actions of the city council released charges against Owen contemporaneous and, in the eyes of the public, connected with that discharge." Majority opinion, *supra* at 6. While this fact might have some bearing on the amount of damages recoverable in a state action for defamation, I cannot agree that it somehow creates an otherwise absent liberty interest entitling plaintiff to a hearing. It is clear that the public impression gleaned from media reports did not conform to the true situation, for the only official charged with responsibility to discharge, the city manager, made no stigmatizing allegation. Nor was he in any way responsible for the mistaken impression gained by the public. *Cf. Cox* v. *Northern Virginia Transportation Commission*, 551 F.2d 555, 558 (4th Cir. 1976). Since nothing in the discharge process itself cast a stigma upon plaintiff, *Paul* v. *Davis* is, in my opinion, controlling.

I agree with the trial court's determination that there is no causal connection between plaintiff's discharge by the city manager and the statements of Roberts at the council proceedings. Such determination is supported by substantial evidence and is not clearly erroneous under

the authorities heretofore cited. No violation of plaintiff's liberty rights in connection with his discharge has been established.

I find it unnecessary to reach the good faith issue. I would affirm the judgment of dismissal.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

George D. OWEN, Plaintiff

v.

CITY OF INDEPENDENCE, MISSOURI, et al., Defendants.

Civ. A. No. 73CV138-W-3.

United States District Court,
W. D. Missouri, W. D.

June 25, 1976.

WILLIAM H. BECKER, Chief Judge.

This is an action under the Civil Rights Act of 1871, Section 1983, Title 42, United States Code, and under the Fourteenth Amendment to the Constitution of the United States. Plaintiff, George D. Owen (hereinafter "plaintiff"), contends that his prior employment as Chief of Police of Independence, Missouri, was terminated without notice of the reasons for the discharge or a hearing in violation of his rights to procedural and substantive due process under the Fourteenth Amendment, and that he was discharged in retaliation for his exercise of First Amendment rights. He seeks declaratory and injunctive relief to compel the defendants to grant him notice and a hearing, and equitable relief in the form of back pay and other fringe benefits from the date of his discharge to the date the defendants grant him the notice and hearing he requests.[1]

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1. In the original and amended complaints, plaintiff made other claims and prayers for relief, including reinstatement. The prayer for reinstatement has been abandoned because plaintiff is now disqualified by reason of his age to be Chief of Police. The claims and prayers for relief other than those considered herein were denied in the "Order Denying Plaintiff's Motion For Summary Judgment and Narrowing Issues For Evidentiary Hearing," filed February 6, 1975.

Defendants are the present City Manager, Mayor, and members of the City Council of the City of Independence (hereinafter "City"); and the City itself. Defendants deny plaintiff's factual and legal contentions, and further assert that even if plaintiff's contentions are determined in his favor, defendants are not liable for damages because they, or their predecessors, acted at all times in "good faith." Defendant City also contends that subject matter jurisdiction does not exist with respect to plaintiff's claims against it.

After completion of the pretrial proceedings, a plenary evidentiary trial without a jury was held on May 17, 1976. The hearing was continued without objection from the parties to June 22, 1976, and was completed on that date. The parties have filed proposed findings of fact and conclusions of law and have fully briefed the legal issues. In order to expedite a final judgment, the following material findings of fact and conclusions of law are made based upon full consideration of the factual and legal contentions of the parties and the evidence presented.

I. FINDINGS OF FACT

Plaintiff is, and at all times material was, a citizen of the United States and a resident of the State of Missouri.

Defendant City is a municipal corporation organized and existing under the laws of the State of Missouri. The City's government is organized in the council-manager form pursuant to a Missouri Constitutional Home Rule city charter adopted December 5, 1961, and amended April 4, 1972.

Defendant Lyle W. Alberg is the duly appointed and acting City Manager and Chief Administrative Officer of the City.

Defendant Richard A. King is the duly elected and acting Mayor of the City and a member of the City Council. He is the successor of Phil K. Weeks who was, on April 17, 1972, and prior thereto, the City's Mayor.

Defendants Charles E. Cornell, Dr. Ray Williamson, Dr. Duane Holder, Ray A. Heady, Mitzi A. Overman, and E. Lee Comer, Jr., are the duly elected and acting members of the City Council of the City. They are the successors of William A. McGraw, Lauzon H. Maxwell, Arthur W. Lamb, R. M. "Rudy" Bonville, Morris D. McQuinn and Paul L. Roberts who were the members of the City Council on April 17, 1972, and prior thereto.

Under Section 3.3(1) of the City's Charter, the City Manager is vested with the sole power to

> "[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads of administrative departments and all other administrative officers and employees of the city. . . ."

Plaintiff, as Chief of Police, was subject to this provision. The Charter did not provide that the Chief of Police was entitled to any notice of reasons, or a hearing, in connection with the termination of his employment.

The City Council, and its members, are prohibited from influencing, or interfering with in any manner, the City Manager's power of appointment and discharge of City employees. Section 2.11 of the City Charter provides that:

> "[n]either the council, the mayor, nor any of its other members may direct the appointment of any person to, or his removal from office or employment by the city manager or by any other authority, or, except as provided in this charter, participate in any manner in the appointment or removal of officers and employees of the city. Except for the purpose of inquiry, the council, the mayor, and its other members shall deal with the administrative service solely through the city manager. . . . If the mayor or any other councilman violates any provision of this section, he shall be guilty of a misdemeanor, and upon conviction thereof, shall cease to be a councilman. . . ."

On February 20, 1967, plaintiff was appointed Chief of Police of the City for an indefinite term by then City Manager Robert L. Broucek. Prior to that time, he had served as an assistant to the Chief of Police of Kansas City, Missouri. Plaintiff was given no contract of employment, and there was no *de facto* tenure system which would have given him a reasonable or legitimate expectation of continued employment. Plaintiff served as Chief of Police until his employment was terminated effective April 19, 1972, by notice in writing of April 18, 1972, by the present City Manager Lyle W. Alberg.

For a substantial period of time prior to March, 1972, plaintiff and City Manager Alberg had had several sharp disagreements over plaintiff's administration of the Police Department, including but not limited to plaintiff's choice of people for positions in the Department and his administration of the Police Department's property room. In early March, 1972, a handgun, which had been destroyed according to records of the Department's property room, was discovered in the hands of a felon by Kansas City, Missouri, police. In about mid-March, 1972 City Manager Alberg initiated an investigation of the property room of the Police Department initially under plaintiff's direction. Later in March, 1972, Alberg decided that the investigation

should be conducted by an independent branch of the city government. He transferred the two police officers who had begun the investigation, Sergeant Robert Jackson and Detective William Reynolds, to the City's Department of Law; and directed City Counselor James S. Cottingham who was head of the Department of Law to supervise the conduct of the investigation and to report the findings of the investigation directly to him.

On or before April 12, 1972, City Manager Alberg received copies of statements of witnesses secured in the investigation, and reports from the City Auditor and City Counselor Cottingham. The City Auditor reported that there were insufficient records in the Police Department property room to make an adequate audit of the property in the property room. Cottingham reported in writing to Alberg that there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room.

At an informal meeting with several of the City Council members, which took place on or before April 10, 1972, City Manager Alberg discussed the investigation and told the City Council members he would take action at an appropriate time to correct any problems in administration of the Police Department disclosed by the investigation. At that time, Alberg intended to keep the witness statements and details of the findings of the investigation confidential.

On April 10, 1972, Alberg communicated by telephone with plaintiff, who was then on vacation in Las Vegas, Nevada. Alberg told plaintiff he was dissatisfied with plaintiff's job performance, and asked plaintiff to resign as Chief of Police and accept another position in the Police Department. He told plaintiff if he refused to accept

another position in the Department, he would be discharged. Plaintiff requested a personal conference with Alberg in Independence the following day.

On April 11, 1972, Alberg and plaintiff met in Alberg's office in Independence. Alberg stated to plaintiff that he was dissatisfied with plaintiff's administration of the Police Department, including plaintiff's lack of supervison over the records section of the Department; the state of those records; and plaintiff's inadequate administration, and lack of control, of the property room which had resulted in the reappearance of supposedly destroyed property in the hands of other people. Alberg again requested plaintiff to resign as Chief of Police, and to accept an advisory position with the Police Department. Plaintiff responded that he was not interested in another position, and that he would fight to remain Chief of Police. Alberg told plaintiff that if he continued to refuse to take another position, his employment with the City would be terminated.

On April 13, 1972, Alberg had a discussion with Lieutenant Lawrence L. Cook of the Police Department, during which he asked Cook if he would be willing to take the position of Chief of Police. Cook stated that he would. On the same day, Alberg released a public communication to the Mayor and City Council concerning the investigation and audit of the Police Department's property room, which stated:

> "At my direction, the City Counselor's office, in conjunction with the City Auditor have completed a routine audit of the police property room.
>
> "Discrepancies were found in the administration, handling and security of recovered property. There ap-

pears to be no evidence to substantiate any allegations of a criminal nature.

"Steps have been initiated on an administrative level to correct these discrepancies."

Alberg's statement was prominently reported by a local newspaper.

Alberg was away from Independence on the weekend of April 15 and 16, 1972. On April 15, he decided to replace plaintiff with Lieutenant Cook as Chief of Police. However, he did not inform anyone of his decision, and did not take formal action to implement his decision until April 18, 1972.

In Alberg's absence, Assistant City Manager Parley Banks became the Acting City Manager. During the weekend, City Councilman Paul L. Roberts requested copies of the reports of the audit and statements of witnesses secured in the investigation of the Police Department property room. Roberts had recently been defeated for reelection to the City Council, and his term was to expire following the meeting of the City Council on the evening of April 17, 1972. Banks, unaware of Alberg's intention to keep the details of the reports confidential, complied with Roberts' request and delivered the documents to Roberts without reading them.

During the weekend Roberts read the reports and unilaterally decided that their contents should be made public. He secretly drafted a statement to be made by him without prior notice to anyone, at the City Council meeting on the evening of April 17, 1972. The statement is described below.

An informal meeting was held on the morning of April 17, 1972, between Alberg and four members of the

City Council, during which the investigation of the Police Department was again discussed. At that time, Alberg did not inform the council members of his intention to discharge plaintiff; and Councilman Roberts did not disclose his intention to make a statement concerning the investigation at the formal meeting of the City Council that evening.

On the evening of April 17, 1972, the City Council held a regularly scheduled meeting. The agenda of the meeting did not list a statement or motion by Councilman Roberts. After completion of the scheduled business, Councilman Roberts read his prepared statement. The statement alleged that plaintiff had taken two television sets from the property room of the Police Department for his own personal use; that numerous firearms in the custody of the Police Department had ". . . found their way into the hands of others including undesirables . . ."; that narcotics being held by the Department ". . . have mysteriously disappeared"; that traffic tickets had been manipulated; that inappropriate requests had been made by "high ranking police officials to the police court"; ". . . that things have occurred causing the unusual release of felons"; and the reports disclosed "gross inefficiencies on the part of a few of the high ranking officers of the police department." Councilman Roberts then moved that the reports be made public; that they be turned over to the Prosecuting Attorney of Jackson County; and that the City Council recommend to the City Manager

> ". . . that he should take all direct and appropriate action permitted under the Charter against such persons as are shown by the investigation to have been involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports, and to complete the investigation."

The full statement is set out in a marginal note.[2] After discussion of Councilman Roberts' motion, six members of the Council voted to approve the motion. Councilman McGraw abstained from voting on the motion.

On April 18, 1972, City Manager Alberg implemented his prior decision to discharge plaintiff as Chief of Police. On that day plaintiff received a written notice from Alberg stating merely that his employment as Chief of Police was "[t]erminated under the provisions of Section 3.3(1) of the City Charter" effective April 19, 1972. Plaintiff requested that Alberg provide him with written notice of

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2. The statement, in its entirety, read:

"On April 2, 1972, the City Council was notified of the existence of an investigative report concerning the activities of the Chief of Police of the City of Independence, certain police officers and activities of one or more other City officials. On Saturday, April 15th for the first time I was able to see these 27 voluminous reports. The contents of these reports are astoundingly shocking and virtually unbelievable. They deal with the disappearance of 2 or more television sets from the police department and signed statement that they were taken by the Chief of Police for his own personal use.

"The reports show that numerous firearms properly in the police department custody found their way into the hands of others including undesirables and were later found by other law enforcement agencies.

"Reports whow (sic) that narcotics held by the Independence, Missouri Chief of Police have mysteriously disappeared. Reports also indicate money has mysteriously disappeared. Reports show that traffic tickets have been manipulated. The reports show inappropriate requests affecting the police court have come from high ranking police officials. Reports indicate that things have occurred causing the unusual release of felons. The reports show gross inefficiencies on the part of a few of the high ranking officers of the police department.

"In view of the contents of these reports, I feel that the information in the reports backed up by signed statements taken by investigators is so bad that the council should immediately make available to the news media access to copies of all of these 27 voluminous investigative reports so the public can be told what has been going on in Independence.

(*Continued on following page*)

the reasons for the termination and a hearing in a letter to Alberg dated April 15, 1972. The letter was not received by Alberg until after plaintiff's discharge. Both the action of the City Council and plaintiff's discharge by City Manager Alberg were prominently reported in local newspapers.

After termination of plaintiff's employment, Alberg referred the investigation reports and statements to the Prosecuting Attorney of Jackson County, Missouri, for consideration by a grand jury as recommended by the City

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Footnote continued—

I further believe that copies of these reports should be turned over and referred to the prosecuting attorney of Jackson County, Missouri for consideration and presentation to the next Grand Jury. I further insist that the City Manager immediately take direct and appropriate action, permitted under the Charter, against such persons as are shown by the investigation to have been involved.

"I have been advised that the City Manager has requested the resignation of the Chief of Police but to date the Chief has not done so. It should be noted that many persons in the Police Department have come forward in the investigation of these matters and have cooperated in this investigation and their efforts are recognized and appreciated. Because these investigative reports and statements have not been available to the news media, I respectfully move as follows:

"I move first that the Council instruct the City Manager to immediately make available to the news media access to copies of all the 27 volumimous (sic) investigative reports and the statements and attachments therewith.

"Second:

"That copies of the investigative reports be turned over and referred to the Jackson County Prosecuting Attorney for presentation to the next Grand Jury.

"Third:

"The City Council recommends to the City Manager that he should take all direct and appropriate action permitted under the Charter against such persons as are shown by the investigation to have been involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports, and to complete the investigation."

Council. The grand jury subsequently returned a "no true bill." Since that time, neither City Manager Alberg nor the City Council made any further investigation of plaintiff's administration of the Police Department.

In April, 1972, plaintiff's attorney requested a hearing on the reasons for plaintiff's discharge. The request was denied by Assistant City Counselor James L. Gillham by a letter to plaintiff's counsel dated May 3, 1973.

Plaintiff contends that his discharge on the day following Councilman Roberts' disclosure of details of the investigation and the City Council's actions has imposed a "stigma" of illegal or unprofessional conduct upon his personal and professional reputation which has impaired his ability to obtain future employment. However, defendants have shown by a preponderance of the evidence that the circumstances of plaintiff's discharge did not result in imposition of such a "stigma" for two reasons.

First, there was no causal relationship between the termination of plaintiff's employment and Councilman Roberts' statement and the action of the City Council. City Manager Alberg had decided prior to the City Council meeting to terminate plaintiff's employment. Alberg had sole responsibility for hiring and discharging the Chief of Police. City Council members were prohibited by law from taking any action to influence Alberg's personnel decisions. Roberts' statement and motion were unauthorized actions under the City Charter. (Plaintiff sued Roberts and Alberg in state court in an action for damages based on the defamatory statement of Roberts and the alleged attempt to procure criminal charges against the plaintiff. During trial of this state court action plaintiff settled with Roberts giving a general release of all liability of Roberts to plaintiff and agreed to drop Alberg as a party.)

Second, plaintiff was completely exonerated in writing from any charges of criminal misconduct arising out of the investigation of the Police Department by City Counselor Cottingham, who was in charge of the investigation as head of the Department of Law, and by City Manager Alberg, who was the only City official with the power to terminate (or reinstate) plaintiff's employment. In his communication to the City Council on April 13, 1972, Alberg publicly stated, on the basis of the report of the City Counselor, that although there was evidence of inefficiency in administration of the Police Department, ". . . there was no evidence to substantiate any allegations of a criminal nature." At no time before or after plaintiff's discharge has City Manager Alberg or the City Counselor ever made any statements which imply that plaintiff's discharge resulted from criminal or other "stigmatizing" misconduct. Further, in addition to Alberg's statement, plaintiff was exonerated by the grand jury's return of a "no true bill" following its investigation of the charges made at the April 17, 1972, City Council meeting.

Plaintiff also alleged in the complaint that his discharge was in retaliation for exercise of First Amendment rights. However, there is no evidence in the record to support that allegation.

Although the foregoing factual determinations are sufficient to determine the issue of liability in favor of defendants, the material factual issues with respect to defendants' "good faith" defense will also be determined. Based on assumptions (without so finding) that "stigmatizing" charges made by Councilman Roberts were the basis for plaintiff's discharge, and that plaintiff was accordingly entitled to notice of the reasons for his discharge and a hearing under the Fourteenth Amendment, the material factual issues on defendants' "good faith" defense are (1)

whether defendants knew, or reasonably should have known, that their refusal to grant plaintiff the requested notice and hearing violated plaintiff's rights under the Fourteenth Amendment; and (2) whether defendants acted with the malicious intention to cause a deprivation of rights guaranteed by the Fourteenth Amendment, or other injury, to the plaintiff.

There is no evidence that the individual defendants knew in April, 1972, that a public employee who was discharged on the basis of serious allegations of illegal or immoral conduct was entitled by virtue of the Fourteenth Amendment to notice of the reasons for his discharge, and to an opportunity for a hearing to clear his reputation. Neither City Manager Alberg, nor any of the members of the City Council were attorneys. Alberg, Mayor Weeks, and Councilmen Maxwell, McGraw, Lamb and McQuinn all testified that they did not know in April, 1972 that such rights existed, and that they relied on the City's Department of Law for legal advice.[3] After receiving plaintiff's letter request for notice of reasons for his discharge and a hearing, Alberg directed an inquiry to the City's Department of Law to determine whether plaintiff was entitled to notice and a hearing. Alberg testified that at no time did City Counselor Cottingham advise him that plaintiff had a right to notice and a hearing under either the City Charter, state law, or the United States Constitution. Cottingham also advised Councilman McGraw and Councilman Roberts' successor, Dr. Eugene Theiss, that plaintiff had no right to a hearing; and Assistant City Counselor James L. Gillham gave the same answer to plaintiff's counsel in response to plaintiff's counsel's request for certification of plaintiff's discharge to the proper appellate board.

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3. Councilman Bonville is deceased.

Further, the individual defendants have proven by a preponderance of the evidence that their belief that plaintiff had no right to notice and a hearing was reasonable. The United States Supreme Court first recognized that a public employee, who was discharged under circumstances imposing a "stigma" on his professional reputation and injuring his ability to find employment in the future, was entitled to notice and a hearing to clear his name in *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). These cases were decided on June 29, 1972, more than two months after plaintiff's discharge. The individual defendants cannot reasonably be charged with notice of the subsequent decision in these cases. Plaintiff presented no evidence that the individual defendants should have recognized the right to a hearing, under the circumstances, on the basis of any other controlling authority in existence in April, 1972.

Finally, there is no evidence that City Manager Alberg or the members of the City Council acted with malice in denying plaintiff's request for notice and a hearing. Alberg testified that his personal relationship with plaintiff was good despite his disagreement with plaintiff over plaintiff's administration of the Police Department. The City Council members all testified that they acted out of a good faith belief that the results of the investigation of the Police Department were matters which should be made public, and that they bore no ill will toward plaintiff personally. Their testimony is credible and is not substantially controverted by opposing evidence.

It is, therefore, factually concluded that plaintiff's employment as Chief of Police was not terminated under circumstances in which his reputation and prospects for future employment were damaged by allegations of im-

moral, illegal, or other "stigmatizing" conduct; that plaintiff's employment was not terminated in retaliation for his exercise of First Amendment rights; and that even if discharged under "stigmatizing" circumstances, the individual defendants acted in good faith in refusing to grant plaintiff's requests for notice of the reasons for his discharge and a hearing to clear his name because they neither knew, or reasonably should have known, of the existence of such rights under the Fourteenth Amendment, and did not act maliciously to deprive plaintiff of Fourteenth Amendment rights or to cause him injury.

II. CONCLUSIONS OF LAW

A. *Subject Matter Jurisdiction*

Subject matter jurisdiction over the claims against the individual defendants under Section 1983, Title 42, United States Code, exists under Section 1343(3) and (4), Title 28, United States Code.

[1] However, Section 1983, Title 42, United States Code, does not create a claim for relief against the defendant City, because a municipal corporation is not a "person" within the meaning of that term as employed in Section 1983. *City of Kenosha* v. *Bruno,* 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Moor* v. *County of Alameda,* 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *Monroe* v. *Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Because Section 1983 does not provide a remedy against the City, Section 1343(3), Title 28, United States Code, does not provide a jurisdictional basis for an action against the City because that provision is linked to statutory claims for relief based on the Civil Rights Acts. *Herzbrun* v. *Milwaukee County,* 504 F.2d 1189 (7th Cir. 1974); *Ybarra* v. *Town of Las Altos Hills,* 503 F.2d 250 (9th Cir. 1974); *Patterson* v. *City of Chester,* 389 F.Supp. 1093 (E.D. Pa. 1975). *See also: United Farm. of Fla. H. Proj., Inc.* v. *City of Delray Beach,* 493 F.2d 799, 802 n.[1](5th Cir. 1974).

[2] Although subject matter jurisdiction does not exist over plaintiff's claims against the City under Section 1343(3) and (4), Title 28, United States Code, a number of federal courts have ruled in cases involving claims of denial of procedural due process in employment termination that jurisdiction over a political subdivision can be based on the general federal question statute, Section 1331, Title 28, United States Code, and on the Fourteenth Amendment to the Constitution of the United States, if the $10,000 amount in controversy requirement is satisfied. *Hostrop* v. *Bd. of Jr. College District No. 515,* 523 F.2d 569 (7th Cir. 1975); *Roane* v. *Callisburg Independent School District,* 511 F.2d 633 (5th Cir. 1975); *Skehan* v. *Board of Trustees of Bloomsburg State College,* 501 F.2d 31 (3rd Cir. 1974), *vacated on other grounds,* 421 U.S. 983, 95 S.Ct. 1986, 44 L.Ed.2d 474 (1975); *Williams* v. *Brown,* 398 F. Supp. 155 (N.D. Ill. 1975); *Patterson* v. *City of Chester,* 389 F. Supp. 1093 (E.D. Pa. 1975); *Maybanks* v. *Ingraham,* 378 F. Supp. 913 (E.D. Pa. 1974). *See also: Dahl* v. *City of Palo Alto,* 372 F. Supp. 647 (N.D. Cal. 1974). *But see: Weathers* v. *West Yuma County School District R—J—1,* 387 F. Supp. 552 (D. Colo. 1974). These courts have implied a remedy against a political subdivision for violation of constitutional rights directly from the Fourteenth Amendment by applying and extending the theory of *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *See generally:* Note, "Damage Remedies Against Municipalities For Constitutional Violations," 89 Harv. L. Rev. 922, 929 (1976). Adopting the reasoning of these authorities, it is

concluded that a claim for relief against the City of Independence can be based directly on the Fourteenth Amendment apart from Section 1983, Title 42, United States Code; and, therefore, that subject matter jurisdiction exists over the claims against the City under Section 1331, Title 28, United States Code, if the amount in controversy requirement is satisfied.

Defendants contend that the amount in controversy requirement has not been satisfied in this case. The general rule is that the amount in controversy must be determined from the complaint itself,

> "unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith . . . it 'must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.'"

Horton v. *Liberty Mutual Insurance Co.*, 367 U.S. 348, 353, 81 S.Ct. 1570, 1573, 6 L.Ed.2d 890, 894 (1961); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 288, 58 S.Ct. 586, 82 L.Ed. 845 (1938). Although the complaint does not contain a prayer for a specific dollar amount of back pay and damages, it does seek

> ". . . back pay, full rights to normal salary increases, and retirement benefits . . . [and] such further actual damages as may be established on hearing. . ."

At the trial, plaintiff clearly established that his back pay and damage claims exceed the $10,000 amount in controversy requirement, and are made in good faith. The complaint will be considered amended to state that plaintiff's claim for back pay and damages exceeds $10,000. Rule 15(b) of the Federal Rules of Civil Procedure. Therefore, it is assumed for the purpose of disposing of this action

that subject matter jurisdiction exists of the claim for relief against the City of Independence under Section 1331, Title 28, United States Code, despite the doctrine of *Monroe* v. *Pape, supra.*

B. *Claim of Denial of Procedural and Substantive Due Process*

[3, 4] Plaintiff contends that the termination of his employment without a notice of specific grounds for the termination and a hearing violated rights to procedural and substantive due process under the Fourteenth Amendment. However, the requirements of procedural due process apply only to a deprivation of interests which come within the Fourteenth Amendment's protection of "property" or "liberty," *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); and the right to substantive due process is no greater than the right to procedural due process, *Buhr* v. *Buffalo Public School District*, 509 F.2d 1196, 1202 (8th Cir. 1975); *Evans* v. *Page*, 516 F.2d 18 (8th Cir. 1975). It must therefore be determined whether plaintiff was deprived of an interest in either "property" or "liberty" in connection with his discharge.

[5-7] The types of property protected by the Due Process Clause vary widely and what may be protected under some circumstances may not be protected under other circumstances. To have a property interest in a benefit,

> ". . . a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth, supra*, 408 U.S. at 577, 92 S.Ct. at 2709, 33 L.Ed.2d at 561.

It is generally held that public office or employment, and in particular an appointed office or position, is not a property interest within the meaning of the Fourteenth Amendment. *See, e.g., Board of Regents* v. *Roth, supra; Abeyta* v. *Town of Taos,* 499 F.2d 323, 327 (10th Cir. 1974); *Lontine* v. *Van Cleave,* 483 F.2d 966 (10th Cir. 1973); *Burks* v. *Perk,* 470 F.2d 163 (6th Cir. 1972), *cert. denied,* 412 U.S. 905, 93 S.Ct. 2288, 36 L.Ed.2d 970 (1973). This general rule is inapplicable in situations when public employees hold contractual rights to continuing employment under formal or *de facto* tenure grounds. *Perry* v. *Sindermann, supra; Buhr* v. *Buffalo Public School District,* 509 F.2d 1196 (8th Cir. 1975); *Abeyta* v. *Town of Taos, supra.* Summary termination of such employment, without a hearing and notice of reasons, under such circumstances, may be actionable. *Wilderman* v. *Nelson,* 467 F.2d 1173 (8th Cir. 1973).

[8] Plaintiff's claim that he was deprived of a property interest in his employment by his discharge, was tentatively dismissed for failure to allege any contractual or other *de facto* right to continued employment as Chief of Police in the "Order Denying Plaintiff's Motion For Summary Judgment and Narrowing Issues For Evidentiary Hearing" filed February 5, 1976, and hereby incorporated herein. At the trial, plaintiff did not present any credible evidence that he had either a contractual right to continued employment, or that there existed a *de facto* tenure system which gave plaintiff a legitimate expectation of continued employment. Rather, a preponderance of the evidence shows that plaintiff knowingly served as Chief of Police at the will of the City Manager and was subject to discharge without notice of reasons and a hearing at any time the City Manager determined that his discharge was "for the good of the service." It is therefore concluded that plaintiff had no property interest in his employment Chief of Police which would entitle him to procedural and substantive due process rights.

[9] Deprivation of an interest in liberty occurs when the discharge of a public employee imposes upon him a stigma or other disability that impairs or forecloses his freedom to take advantage of other employment opportunities. *Board of Regents* v. *Roth, supra; Arnett* v. *Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Goss* v. *Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515, 519 (1971). *Cf. Paul* v. *Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), explaining limitations on the doctrine of *Wisconsin* v. *Constantineau, supra.*

[10, 11] To be "stigmatizing" the charges must be considerably graver than charges of improper inadequate job performance, or a failure to meet minimum standards of professional conduct. The charges must involve imputation of illegal, dishonest or immoral conduct which call the employee's good name, honor or integrity into question before a deprivation of liberty occurs. *Velger* v. *Cawley,* 525 F.2d 334 (2nd Cir. 1975); *Lake Michigan Col. Fed. of Teachers* v. *Lake Mich. Com. Col.,* 518 F.2d 1091 (6th Cir. 1975); *Russell* v. *Hodges,* 470 F.2d 212 (2nd Cir. 1972); *Springston* v. *King,* 399 F. Supp. 985 (W.D. Va. 1975); *Muir* v. *County Council of Sussex County,* 393 F. Supp. 915 (D. Del. 1975); *Bishop* v. *Wood,* 377 F. Supp. 501 (W.D. N.C. 1973), aff'd, 498 F.2d 1341 (4th Cir. 1974), aff'd, 423 U.S. 890, 96 S.Ct. 185, 46 L.Ed.2d 121 (June 8, 1976). Further, to be "stigmatizing" the charges must have been made public in some intentional or official manner which affects the discharged employee's chances of securing another job. *Ortwein* v. *Mackey,* 511 F.2d 696 (5th Cir.

1975); *Buhr* v. *Public School District*, 509 F.2d 1196 (8th Cir. 1975); *Kaprelian* v. *Texas Women's University*, 509 F.2d 133 (5th Cir. 1975); *Wellner* v. *Minnesota State Junior College Board*, 487 F.2d 153 (8th Cir. 1973).

Plaintiff contends that because his discharge occurred the day following Councilman Roberts' public statement charging him expressly and by implication with gross misconduct of the administration of the Police Department, and the actions of the City Council which followed, a "stigma" was imposed on his professional reputation which has impaired or foreclosed future employment opportunities. The defendants, however, have disproved plaintiff's contention that the circumstances of his discharge imposed a "stigma" upon his reputation by a preponderance of the evidence for three reasons.

First, the only official reason ever given for plaintiff's discharge by City Manager Alberg, who possessed sole authority to hire and discharge the Chief of Police, was that plaintiff was "[t]erminated under the provisions of Section 3.3(1) of the City Charter." Thus, there are no statements in plaintiff's official record imputing any illegal, immoral, or other "stigmatizing" conduct to him.

Second, the statement made by Councilman Roberts and the actions taken by the City Council had no causal connection to the termination of plaintiff's employment. City Manager Alberg had decided prior to the April 17, 1972, City Council meeting to discharge plaintiff, and had even obtained a replacement for plaintiff before the meeting. Further, the City Council and its members were prohibited by the City Charter to attempt in any manner to influence City Manager Alberg's decisions about hiring and discharging city employees, including the Chief of Police, so their action was unauthorized.

Finally, prior to his discharge, plaintiff was completely exonerated from any charges of illegal or immoral conduct by City Counselor Cottingham, who supervised the investigation of the plaintiff's administration of the Police Department, and by City Manager Alberg, who possessed the sole power to hire and discharge the Chief of Police. He was further exonerated subsequent to his discharge by the grand jury which was presented with the full investigative file referred to by Councilman Roberts in his public statement.

On the basis of the above findings of fact, it is concluded that the circumstances of plaintiff's discharge did not impose a stigma of illegal or immoral conduct on his professional reputation. At most, the circumstances of the termination of plaintiff's employment suggested that, as Chief of Police, plaintiff had been an inefficient administrator. Plaintiff was therefore not deprived of an interest in liberty in connection with his discharge, and accordingly he was not entitled to procedural due process rights under the Fourteenth Amendment.

C. *Claim That Discharge Was In Retaliation For Exercise of First Amendment Rights.*

Plaintiff contends that his employment was terminated in retaliation for his exercise of First Amendment rights. The Supreme Court has made clear that

> ". . . even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."

Perry v. *Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 470, 477 (1972).

However, as factually found and herein legally concluded, plaintiff presented no evidence that he was discharged in retaliation for his exercise of any rights protected by the First and Fourteenth Amendments. The evidence presented by the defendants disproved this contention.

D. *"Good Faith" Defense.*

[12] Recent decisions of the United States Supreme Court have established the existence of a "good faith" defense against personal liability for damages under Section 1983, Title 42, United States Code. *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The defense exists for persons exercising executive functions. *O'Connor* v. *Donaldson, supra; Scheuer* v. *Rhodes, supra.* It also exists for members of the city council. *See e.g.: Rasmussen* v. *City of Lake Forrest, Illinois*, 404 F. Supp. 148 (N.D. Ill. 1975). *See Also: Wood* v. *Strickland, supra; Mims* v. *Board of Education of City of Chicago*, 523 F.2d 711 (7th Cir. 1975); *Bertot* v. *School District No. 1, Albany County, Wyo.*, 522 F.2d 1171 (10th Cir. 1975); *Jones* v. *Diamond*, 519 F.2d 1090 (5th Cir. 1975). Because of their legislative functions the immunity of city council members may be even broader than that accorded by the "good faith" defense. *Compare: Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

[13] Although the precise nature of the "good faith" defense as applicable to a city manager and members of a city council has not yet been fully explored or defined

by the courts of appeals[4] or the Supreme Court, the defense has been defined in other contexts. Under the most strict formulation of the defense, applied to members of a school board in *Wood* v. *Strickland, supra*, 420 U.S. 308, at 322, 95 S.Ct. 992, at 1000, 43 L.Ed.2d 214, at 225, and applied to administrators of a state mental hospital in *O'Connor* v. *Donaldson, supra*, 422 U.S. 563, at 577, 95 S.Ct. 2486, at 2494, 45 L.Ed.2d 396, at 408, the material factual issues are whether the individual defendant

> ". . . 'knew or reasonably would have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [plaintiff]."

The Supreme Court has further emphasized that "[f]or purposes of this question, an official has, of course, no duty to anticipate unforeseeable constitutional developments." *O'Connor* v. *Donaldson, supra; Wood* v. *Strickland, supra.*

Had the individual defendants been sued in their individual capacities, defendants have clearly shown by a preponderance of the evidence that neither they, nor their predecessors, were aware in April 1972, that, under the circumstances, the Fourteenth Amendment accorded plaintiff the procedural rights of notice and a hearing at the time of his discharge. Defendants have further proven that they cannot reasonably be charged with constructive notice of such rights since plaintiff was discharged prior

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4. *Lane* v. *Inman*, 509 F.2d 184 (5th Cir. 1974); *Nelson* v. *Knox*, 256 F.2d 312 (6th Cir. 1958) [Stewart, J.]; *Cobb* v. *City of Malden*, 202 F.2d 701 (1st Cir. 1953) (Magruder, J., concurring); *Smetanka* v. *Borough of Ambridge, Pennsylvania*, 378 F. Supp. 1366 (W.D. Pa. 1974); *Bunch* v. *Barnett*, 376 F. Supp. 23 (D.S.D. 1974); *Oberhelman* v. *Schultze*, 371 F. Supp. 1089 (D. Minn. 1974); *Young* v. *Coder*, 346 F. Supp. 165 (M.D. Pa. 1972).

to the publication of the Supreme Court decisions in *Roth* v. *Board of Regents, supra,* and *Perry* v. *Sindermann, supra. See e.g.*: *Mims* v. *Board of Education of City of Chicago,* 523 F.2d 711 (7th Cir. 1975); *Bertot* v. *School District No. 1, Albany County, Wyo.*, 522 F.2d 1171 (10th Cir. 1975). Finally, the individual defendants have proven that they did not act with a malicious intent to deprive plaintiff of his constitutional rights or to cause plaintiff other injury.

However, the individual defendants have been sued only in their official capacities, and would, therefore, not be personally liable for any award of equitable relief in the form of back pay, or damages, regardless of their good faith. By suing the individual defendants only in their official capacities, and by joining the City of Independence as a defendant, plaintiff ultimately seeks relief from the City of Independence. The question presented is thus whether the City of Independence can assert a good faith defense based on the good faith of its agents against liability for claims based directly on the Fourteenth Amendment.

[14] The purposes of the good faith defense are (1) to avoid the injustice of subjecting a public official who is required by the legal obligations of his position to exercise discretion to liability in the absence of bad faith; and (2) to encourage public officials to execute their offices with the decisiveness and judgment required by the public good. *Wood* v. *Strickland, supra,* 420 U.S. at 319-321, 95 S.Ct. at 999-1000, 43 L.Ed.2d at 223-224; *Scheuer* v. *Rhodes,* 416 U.S. at 241-242, 94 S.Ct. at 1688-1689, 40 L.Ed.2d at 99-100. Substantial arguments have been made that the reasons for permitting persons acting under color of state law to assert a good faith defense against personal liability are inapplicable to actions against a governmental unit. *See, e.g.*: Note, "Damage Remedies Against Municipalities For Constitutional Violations," 89 Harv. L. Rev. 922,

955-958 (1976). The United States Court of Appeals for the Seventh Circuit has ruled that damages for violation of a constitutional right can be recovered from a governmental unit even though the governmental unit's agents were protected from personal liability by a good faith defense. *Hostrop* v. *Board of Junior College Dist. No. 515,* 523 F.2d 569, 576-579 (7th Cir. 1975); *cert. denied,* 425 U.S. 963, 96 S.Ct. 1748, 48 L.Ed.2d 208 (1976).

[15] Nevertheless, the imposition of liability on a governmental unit because of the acts of public officials acting in good faith would also impair the ability of public officials to exercise their legal duties forthrightly as required by the public good. The distinction between imposing personal liability on the official and imposing liability on the public body or agency that he serves which underlies the argument against permitting a governmental unit to assert a good faith defense is not convincing. A conscientious public official's discharge of his duties will be impaired regardless whether liability is imposed on him personally or upon the public as a whole. The difference in impairment is one of degree. It is the fact of liability, rather than the party upon whom it is directly imposed, which should be the controlling factor. It is therefore concluded that the City of Independence is entitled to assert a good faith defense against liability based directly on the Fourteenth Amendment; and that the City has established a good faith defense against liability in this action by proof of the good faith of the individual defendants who acted as the agents and officers of the City of Independence.

For the foregoing reasons, it is therefore

ORDERED and ADJUDGED that plaintiff's claims for relief be, and they are hereby, determined to be without merit. It is further

ADJUDGED that plaintiff be, and he is hereby, denied all relief prayed for in the complaint.

ON MOTION TO AMEND OR VACATE AND FOR ADDITIONAL FINDINGS

Plaintiff has moved to amend the findings of fact and conclusions of law and for additional findings of fact. Plaintiff has also moved to vacate or amend the final judgment or in the alternative for a new trial. Defendants have filed opposing suggestions.

Plaintiff's motion to amend the findings of fact and conclusions of law and to make additional findings, and the supporting suggestions have been carefully reviewed. The additional findings requested in paragraphs 1, 2, 3, and 4, while substantially true factually, are adequately covered on page 10 of the memorandum filed June 25, 1976. The findings requested in paragraphs 5, 6, and 7 are not supported by substantial evidence. The findings requested in paragraphs 8 and 9 will be denied for the reasons stated below.

Plaintiff bases his motion to vacate or amend the final judgment, or in the alternative for a new trial, on three grounds. First, he contends that no ruling was made on the question whether plaintiff had a right to notice and a hearing under Missouri law, and that Missouri law requires notice and a hearing. Second, he contends that the evidence supports a finding that there was an implied contract that his employment would only be terminated for cause with notice and an opportunity for a hearing. Third, he contends that there was a sufficient nexus between Councilman Roberts' statement and the actions of the City Council on April 17, 1972, and his discharge on April 18, 1972, to support a finding that "stigmatizing"

charges were made "in the course of" the termination of his employment.

(1) *State Law.*

The United States Supreme Court has recognized that a public employee has a "property" interest in his continued employment if state law guarantees a right to notice and hearing in connection with the termination of his employment. *Bishop* v. *Wood,* 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (June 10, 1976); *Board of Regents* v. *Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Plaintiff contends that under Missouri law, because he could only be discharged "for the good of the service," he was entitled to notice and a hearing.

Contrary to plaintiff's allegation that no ruling has been made on this contention, the contention was expressly rejected on page 17 of the "Order Denying Plaintiff's Motion For Summary Judgment And Narrowing Issues For Evidentiary Hearing," filed February 5, 1976. However, because of the importance of this issue, the reasons for that ruling will be more fully stated herein.

[16] Article 7, Section 4, of the Missouri Constitution of 1945 provides in pertinent part that ". . . all officers not subject to impeachment shall be subject to removal from office *in the manner and for the causes provided by law.*" (emphasis supplied) The Chief of Police of the City of Independence is not subject to impeachment under the Missouri Constitution, and thus Article 7, Section 4, was applicable to plaintiff. *Cf. State* v. *Williams,* 346 Mo. 1003, 144 S.W.2d 98 (1940). The principal issue in this case is what the applicable "law" is.

[17, 18] The city government of the City of Independence is organized in the council-manager form under a

"home rule" charter authorized by Article 6, Section 19, of the Missouri Constitution of 1945. Article 6, Section 22, of the Missouri Constitution of 1945 provides in pertinent part that

> "[n]o law shall be enacted creating or fixing the powers, duties or compensation of any municipal office or employment, for any city framing or adopting its own charter under this or any previous constitution. . . ."

This provision was intended to give "home rule" charter cities a "broad measure of complete freedom from State legislative control [over municipal employment decisions]." *State* v. *Cervantes*, 423 S.W.2d 791 (Mo. 1968). *See*: Schmandt, "Municipal Home Rule In Missouri," 1953 Wash. U.L. Quarterly 385, 406 (1953). *Cf. City of St. Louis* v. *Missouri Commission on Human Rights*, 517 S.W.2d 65 (Mo. 1974). This constitutional provision is persuasive authority that the applicable "law" governing the employment decisions of charter cities is the charter itself, and not state statutes or prior judicial law. This ruling is consistent with the Missouri "home rule" concept that matters of local interest are to be governed solely by the charter. *See*: Westbrook, Municipal Home Rule: An Evaluation of the Missouri Experience, 33 Mo. L. Rev. 45 (1968).

The Charter of the City of Independence (hereinafter "Charter") classifies municipal employees into the "classified" and "unclassified" service. Section 3.28 of the Charter expressly provides that an employee in the "classified" service shall have a right to notice and a hearing prior to the termination of his employment. Section 3.1 of the Charter accords similar rights to the City Manager. However, no such rights are expressly provided to heads

of administrative departments such as the Chief of Police. The only provision in the Charter pertaining to the manner of and grounds for, the discharge of the head of an administrative department is Section 3.3(1) which authorizes the City Manager to

> "[a]ppoint, and when necessary for the good of the service . . . remove all directors or heads of administrative departments. . . ."

[19] Plaintiff argues that in spite of the fact that heads of administrative departments are not *expressly* accorded rights to notice and a hearing, such rights are to be *implied* from the fact that heads of administrative departments were made dischargeable only "when necessary for the good of the service." However, from Sections 3.28 and 3.1 of the Charter, it is clear that the drafters of the Charter knew how to expressly provide for rights to notice and a hearing when such rights were intended. In view of the express provision of such rights to other employees, it is unlikely that the drafters intended to accord heads of administrative departments such rights by implication through use of the phrase "for the good of the service." Rather the absence of an express provision of such rights is persuasive evidence that no such rights were intended to exist.

Plaintiff has cited several early Missouri cases in support of his contention that an employee dischargeable only "for cause" or "for the good of the service" is entitled to notice and a hearing prior to his discharge.[1] However, these cases are distinguishable on their facts from this

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1. *State ex rel. Eckles* v. *Kansas City*, 257 S.W. 197 (Mo. App. 1923); *State ex rel. Reid* v. *Walbridge*, 119 Mo. 383, 24 S.W. 457 (Mo. 1893); *State ex rel. Denison* v. *City of St. Louis*, 90 Mo. 19, 1 S.W. 757 (Mo. 1886).

case.[2] To the extent that dicta in those cases, when read out of context, seems to support plaintiff's contention, those cases are not considered applicable. As stated above, the applicable "law" in this case is the Charter of the City of Independence, which clearly does not provide rights to notice and a hearing, and not state statutory or judicial law which may be to the contrary.

For these reasons, it is concluded that plaintiff was accorded no right to notice or a hearing by Missouri law.

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2. In *State ex rel. Eckles* v. *Kansas City, supra*, a discharged district inspector for the water department of the City of Kansas City petitioned for a writ of mandamus to compel the City of Kansas City to restore him to his position. The only reasons given for his discharge were

"[r]eduction in force and good of the service." However, there was substantial evidence that he had been discharged because of his political affiliation. [*Cf. Elrod* v. *Burns*, ... U.S. ....., 96 S.Ct. 2673, 49 L.Ed.2d 547 (June 28, 1976)]; and that his discharge was intended to be final. The City of Kansas City had a "complete civil service law governing tenure positions held by city employees" which was applicable to the discharged employee whose position in the competitive class of the city service was similar to that of the "classified" service of the City of Independence in this action. The applicable charter provision provided:

> "No person in the city's service shall be removed . . . because of political . . . beliefs of such persons; nor shall any person in the competitive class of the city service be removed . . . without first having received a written statement setting forth in detail the reasons therefor. * * * In case of discharge of any person owing to the reduction of force, the discharged perron shall receive a certificate so stating, and shall be placed on the eligible list with the same rank he had already attained, and shall have a preference over those on the eligible list, and those who have served the longest before being so discharged shall be first restored."

The writ was granted to compel the City of Kansas City to restore the discharged employee to his job because he had been discharged for political reasons, no detailed statement of the reasons for his discharge had been granted, and his name was not placed on the "eligible" list all in violation of the above charter provision. This case is distinguishable because it involved an employee with tenure under the civil service law, and the charter expressly gave him a right to a detailed statement of the reasons for his discharge, while plaintiff Owen was dischargeable at will and was accorded no right to notice and a hearing by the Charter of the City of Independence.

(*Continued on following page*)

(2) *Allegation of "Implied" Contract.*

Plaintiff contends that the evidence shows that although he had no express rights to notice and a hearing under the Charter, and no contract of employment, he was employed with the understanding that his employment would only be terminated for cause with notice and a hearing. He further contends that this "understanding" gave rise to a legitimate expectation of continuing employment sufficient to constitute a "property" interest.

However, the evidence not only fails to support this contention, but in fact refutes it. Plaintiff was employed with the understanding that he served at the will of the City Manager. He had no "legitimate expectation of continuing employment."

Footnote continued—

In *State ex rel. Denison* v. *City of St. Louis, supra*, a discharged police justice brought an action to test the validity of a resolution of the council of the municipal assembly of St. Louis which removed him from office. Police justices were appointed by the mayor for a term of four years unless removed "for cause." Because he could only be removed from office prior to the expiration of his four year term of office "for cause," a right to notice and a hearing were implied.

The Court expressly noted, however, that "[w]here an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing." Plaintiff Owen, in contrast to the police justice who was appointed for a term of years, served at the will and pleasure of the city manager.

Finally, in *State ex rel. Reid* v. *Walbridge, supra*, the commissioner of public buildings of St. Louis petitioned for a writ of prohibition to prohibit the mayor of St. Louis from trying him on charges of dereliction of duties prior to his removal from office as provided by the charter. He contended that a state statute enacted subsequent to the charter provision, which provided a procedure for forfeiture of public employment to be initiated by the prosecuting attorney, had repealed the charter provision authorizing the mayor to prefer such charges by implication. Thus, the charter in that case, contrary to the Charter of the City of Independence, expressly provided a right to a hearing. It should again be noted that each of these cases was decided prior to the adoption of the Missouri Constitution of 1945 which, as more fully stated on pages 3 and 4, *supra*, provides that the governing law on the rights of an employee of a charter city is the charter alone and not prior statutory or judicial law.

(3) *Whether "Stigmatizing" Charges Were Made "In The Course Of" The Termination of Plaintiff's Employment.*

In *Paul* v. *Davis*, 424 U.S. 693, 6 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Supreme Court in construing *Board of Regents* v. *Roth, supra*, stated:

> "Thus, it was not thought sufficient to establish a claim under §1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur *in the course of* the termination of employment." (emphasis added)

Plaintiff contends that the evidence is sufficient to show that the alleged "stigmatizing" charges made by Councilman Roberts and actions of the City Council on April 17, 1972, were made "in the course of" the termination of plaintiff's employment.

[20] However, this contention was rejected because the evidence shows that the decision to terminate plaintiff's employment was made at least seven days prior to the April 17, 1972, City Council meeting by City Manager Alberg, who had publicly exonerated plaintiff from all charges of criminal conduct. There was no causal or other substantial connection between the events which occurred at the April 17, 1972, City Council meeting and plaintiff's discharge.

For the foregoing reasons, it is therefore

ORDERED that plaintiff's motion to amend the findings of fact and conclusions of law and for additional findings be, and it is hereby, denied. It is further

ORDERED that plaintiff's motion to alter or amend judgment, or in the alternative for a new trial be, and it is hereby, denied.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D. C. 20543

June 26, 1978

Irving Achtenberg, Esq.
Suite 700
906 Grand
Kansas City, MO 64106

RE: City of Independence, Missouri, et al.
v. George D. Owen
No. 77-914

Dear Mr. Achtenberg:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Monell v. Dept. of Social Services of the City of New York, 436 U.S. (1978).

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ Edward Faircloth
Assistant Clerk

Supreme Court, U. S.
FILED
NOV 14 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1779

GEORGE D. OWEN,
Petitioner,

vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petition for Certiorari Filed May 29, 1979
Certiorari Granted October 1, 1979

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1779

GEORGE D. OWEN,
Petitioner,

vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 12, 1973 - Plaintiff Owen's original complaint filed in the U. S. District Court for the Western District of Missouri.

April 16, 1973 - Defendant's original answer filed.

December 19, 1974 - Plaintiff Owen's first amended complaint filed.

May 17, 1976 - Trial of action to the court commenced. At the close of the day's testimony, trial is continued until further order of court.

June 22, 1976 - Trial of action resumed. Case is submitted.

June 22, 1976 - Defendants' first amended answer filed.

June 25, 1976 - Findings of Fact, conclusions of law and final judgment for defendants filed by the court.

July 6, 1976 - Plaintiff's motion to amend findings of fact and conclusions of law and for additional findings and motion to vacate or amend judgment or in the alternative for a new trial filed.

July 9, 1976 - Order correcting clerical errors filed by the court.

August 2, 1976 - Orders denying plaintiff's motion to amend findings of fact and conclusions of law and for additional findings and motion to vacate or amend judgment or in the alternative for a new trial filed by the court.

August 25, 1976 - Plaintiff's notice of appeal filed.

September 8, 1976 - Defendant's notice of appeal filed.

August 15, 1977 - Original opinion and judgment of the Court of Appeals for the Eighth Circuit.

September 26, 1977 - Order of the Court of Appeals for the Eighth Circuit denying rehearing or rehearing en banc.

December 27, 1977 - Defendants' petition for writ of certiorari filed.

June 26, 1978 - Order of the Supreme Court of the United States granting certiorari, vacating the judgment and remanding the case to the United States Court of Ap-

peals for the Eighth Circuit for further consideration in light of *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978) filed.

December 1, 1978 - Opinion on remand and judgment of the United States Court of Appeals for the Eighth Circuit filed.

January 29, 1979 - Petition for rehearing denied.

April 10, 1979 - Order of Mr. Justice Blackman extending until May 29, 1979 time for the filing of petition for writ of certiorari.

May 29, 1979 - Plaintiff's petition for writ of certiorari filed.

October 1, 1979 - Order granting plaintiff's petition for writ of certiorari filed.

PLAINTIFF'S FIRST AMENDED COMPLAINT, FILED DECEMBER 19, 1974

[Designated Record 002]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

Civil Action No. 73 CV 138-W-3

GEORGE D. OWEN, 4343 Brentwood, Independence, Mo. 64055, Plaintiff,

vs.

THE CITY OF INDEPENDENCE, MISSOURI, a Missouri municipal corporation, City Hall, 103 North Main, Independence, Missouri,

LYLE W. ALBERG, City Manager of the City of Independence, City Hall, 103 North Main, Independence, Missouri,

PHIL K. WEEKS, Mayor of the City of Independence, City Hall, 103 North Main, Independence, Missouri,

and

WILLIAM A. McGRAW, LAUZON H. MAXWELL, ARTHUR W. LAMB, R. M. "RUDY" BONVILLE, MORRIS D. McQUINN, DR. EUGENE THEISS, Members of the Council of the City of Independence, Missouri, City Hall, 103 North Main, Independence, Missouri, Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, PRELIMINARY AND PERMANENT INJUNCTION AND DAMAGES

Comes now the plaintiff and with leave of court granted, for his first amended complaint against the defendants, states:

JURISDICTION

1. This is a civil action seeking a declaratory judgment, injunctive relief and damages because of the deprivation, under color of state law, of plaintiff's rights, privileges and immunities under the United States Constitution. The jurisdiction of this court is involved pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(3) and (4), 28 U.S.C. § 2201, 28 U.S.C. § 2202, 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the First, Fifth and Fourteenth Amendments to the United States Constitution.

[Designated Record 003]

PARTIES

2. Plaintiff George D. Owen is a citizen of the United States and of the State of Missouri. Until unlawfully terminated he was the Chief of Police of the City of Independence, Missouri in good standing employed by defendant City.

3. Defendant City of Independence, Missouri (hereinafter called "City") is a municipal corporation organized and existing under the laws of the State of Missouri and operating under a charter duly adopted under the laws of Missouri, under which it operates a police department, the director of which is the Chief of Police.

4. Defendant Alberg is the duly appointed and acting City Manager and Chief Administrative Officer of said

City. Under Section 3.3(1) of the Charter of said City the City Manager has the authority to "appoint and when deemed necessary for the good of the service . . . remove all directors or heads of administrative departments."

5. Defendant Weeks is the duly elected and acting Mayor of the City of Independence and a member of the Council of said City.

6. Defendants McGraw, Maxwell, Lamb, Bonville, McQuinn and Theiss are the other duly elected and acting members of the City Council of said City. Under the Charter the Mayor is the presiding officer of the Council, the Council is the policy making body of the City, and the City Manager is responsible for implementing the policies of the Council.

7. All of the individual defendants are sued in their official capacities.

FACTS

8. Plaintiff was, until terminated, an employee of defendant City for over five years as the duly appointed Chief of Police and has performed all of his official duties in a highly satisfactory manner.

9. On or about April 18, 1972, plaintiff received written notice from defendant City Manager stating that his employment as Police Chief was "terminated under the provisions of Section 3.3(1) of the City Charter."

[Designated Record 004]

10. No other written reasons for the termination were given plaintiff, although specific reasons were requested in writing, nor was he granted a hearing, although also requested in writing.

11. Plaintiff claims that his employment was wrongfully terminated because of his exercise of constitutional rights of freedom of expression as guaranteed by the First Amendment to the Constitution of the United States in that he has frequently spoken out publicly as to the need of the Police Department for pay raises, more manpower and better facilities.

12. Plaintiff further claims that Section 3.3(1) of the Charter violates the First and Fourteenth Amendments to the United States Constitution in that the phrase "when deemed necessary for the good of the service" is unconstitutionally vague and overbroad in that its terms are so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application and so overbroad that they are susceptible of sweeping and improper application.

13. Under Sections 3.1 and 3.28 of the Charter and personnel rules adopted by the Council, virtually all city employees including the City Manager have a right to reasons and a hearing prior to removal from office or employment. However these rights are denied the directors of administrative departments, including plaintiff, which denial is a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, there being no compelling governmental reason for granting such rights to the City Manager and various other city employees, but denying them to plaintiff, creating an invidious discrimination and classification.

14. The failure of defendants to state constitutionally permissible reasons for termination of plaintiff's employment and the failure to grant plaintiff a hearing were denials of the right of procedural due process guaranteed under the Fourteenth Amendment.

15. Plaintiff is an experienced law enforcement officer, having served 30 years with the Kansas City Police Department in which he held the rank of a Major, prior to his employment as [Designated Record 005] Chief of Police of Independence. He has received numerous awards for his professional activities and public acclaim for building an efficient and effective Police Department.

16. Plaintiff's termination followed an audit and investigation of the Police Department and a secret report which was referred to the Grand Jury by the defendant councilmen and City Manager following public statements by then Councilman Paul L. Roberts falsely imputing illegal, wrongful or grossly inefficient activities to plaintiff. Although no action was taken by the Grand Jury the Council has failed to make public the results of the audit and investigation, thereby leaving a cloud or suspicion of misconduct over plaintiff's professional reputation, although he has not been formally charged with nor has he been guilty of any specific misconduct in office.

17. By the actions of defendants plaintiff has suffered loss of "liberty" and "property" as protected by the Fifth and Fourteenth Amendments. His termination without formal charges or hearing have left a cloud over his professional and personal reputation and damaged his community standing. Although he has made numerous applications for employment in the field of law enforcement he has been unable to gain such employment. Plaintiff's interest in his good name, reputation, honor and integrity are at stake and the actions of defendants have imposed upon him a stigma or disability which has foreclosed his freedom to take advantage of other employment opportunities.

18. Under the laws and decisions of the State of Missouri where a City Charter authorizes the removal

of an appointed officer for cause there is an implied requirement of proper notice to the officer, charges preferred and full opportunity for him to be heard, all of which rights have been denied plaintiff.

19. The defendants under color of state law have purposefully subjected plaintiff, a citizen of the United States, to deprivation of rights, privileges and immunities secured to him by the Constitution and laws of the United States.

[Designated Record 006]

20. The actions of defendants in terminating plaintiff's employment and failing and refusing to reemploy plaintiff were likewise arbitrary and capricious in that they are not based on any factual grounds relating to his professional competence or performance. Such actions therefore constitute a denial of substantive due process, guaranteed by the Fourteenth Amendment.

21. The actions of defendants have caused irreparable damage to plaintiff in that he has and will suffer loss of professional standing and reputation, inability to pursue his occupation as a police officer, loss of earnings and retirement and pension benefits, unless this Court grants appropriate relief.

22. Plaintiff has suffered and is threatened with, serious and irreparable harm and injury by reason of the acts of defendants.

23. He has no pain, adequate or complete remedy to redress these wrongs other than this complaint. He has exhausted all available administrative remedies.

24. Plaintiff's damages in this action exceed $10,000.00.

WHEREFORE, plaintiff prays for the following relief:

1. That this Court try and determine the issues and declare:

(a) That Section 3.3(1) of the Charter of the City of Independence, Missouri is void for vagueness and overbreath [sic] in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution;

(b) That the failure and refusal of defendants to reemploy plaintiff is a violation of his constitutional right to freedom of speech;

(c) That the failure to provide plaintiff with written grounds for his termination and a hearing is a denial of his constitutional right to procedural due process;

(d) That the actions of defendants were arbitrary and capricious, in denial of substantive due process;

(e) That the provisions of the Charter of the City of Independence denying heads of department the rights to be given reasons for termination and the right to a hearing violate the Equal Protection Clause in that such rights are granted other city employees and there is no compelling governmental reason for making such an invidious classification;

[Designated Record 007]

(f) That plaintiff has suffered injury to constitutionally protected liberty and property rights by the actions of defendants.

2. That preliminary and permanent mandatory injunctions issue ordering defendants to reinstate plaintiff in his same capacity and position with back pay, full rights to normal salary increases, and retirement benefits.

3. That plaintiff be awarded such further actual damages as may be established on hearing, his reasonable attorney fees and costs incurred herein.

4. Such other orders and relief as the Court may deem proper.

(Signatures and Certificate Omitted
in Printing)

DEFENDANTS' FIRST AMENDED ANSWER, FILED JUNE 22, 1976

[Designated Record 037]

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

[Caption Omitted in Printing]

DEFENDANTS' FIRST AMENDED ANSWER

Come now defendants for their first amended answer to the plaintiff's first amended complaint and respectfully allege:

1. That defendants deny that this action arises under the Constitution of the United States and deny that there has been any threatened or actual deprivation, under color of state law, of any right, privilege, or immunity secured to the plaintiff by the Constitution of the United States.

2. That defendants deny the allegations contained in paragraph 1 of plaintiff's complaint.

3. That defendants admit, based upon information and belief, that plaintiff George D. Owen is a citizen of the United States and of the State of Missouri and that

plaintiff was the Chief of Police of the City of Independence, Missouri, employed by said City until terminated on or about April 18, 1972. The defendants specifically deny the remaining allegations in paragraph 2 of plaintiff's complaint.

4. That defendants admit the allegations contained in paragraph 3 of plaintiff's complaint.

5. That defendants admit the allegations contained in paragraph 4 of plaintiff's complaint.

6. That defendants admit that defendant Weeks was the duly elected and acting Mayor and a member of the City Council of Independence.

7. That defendants admit that defendants McGraw, Maxwell, Lamb, Bonville, McQuinn and Theiss were the duly elected and acting members of the City Council of the City. That defendants admit that the Mayor, the Council and the City Manager have such powers and duties as provided in the Charter of said City, including [Designated Record 038] those powers stated in Article 2 and Article 3 of said Charter.

8. That defendants admit the allegations contained in paragraph 7 of plaintiff's complaint.

9. That defendants admit that plaintiff was, until terminated, an employee of the defendant, City of Independence, Missouri, (hereinafter called "City") for over five years as the duly appointed Chief of Police. That defendants specifically deny the remaining allegations of paragraph 8 of the complaint.

10. That defendants admit the allegations contained in paragraph 9 of the complaint.

11. That defendants deny, based upon information and belief, the allegations contained in paragraph 10 of the complaint.

12. That defendants deny upon information and belief the allegations contained in paragraph 11 of the complaint.

13. That defendants deny upon information and belief the allegations contained in paragraph 12 of the complaint.

14. That defendants admit, based upon information and belief, that under Sections 3.1 and 3.28 of the Charter and Personnel Rules adopted by the Council, virtually all City employees including the City Manager have a right to reasons and a hearing prior to removal from office or employment. That defendants further admit that under said Charter and Personnel Rules these rights are denied the directors of administrative departments, including plaintiff. That defendants deny, based upon information and belief, the remaining allegations of paragraph 13 of the complaint.

15. That defendants deny upon information and belief the allegations contained in paragraph 14 of the complaint.

16. That defendants deny knowledge or information sufficient to say whether or not the allegations of paragraph 15 in the complaint are true or false.

17. That defendants admit the occurrence of an audit and an investigation of the Police Department prior to plaintiff's termination. That defendants admit the City Council recommended presentation of secret reports to the Grand Jury. That defendants admit that the Grand Jury returned a no true bill. That defendants admit that the Council has failed to make public the results [Designated Record 039] of the audit and investigation. That defendants deny upon information and belief the remaining allegations of paragraph 16 in the complaint.

18. That defendants deny upon information and belief the allegations contained in paragraph 17 of the complaint.

19. That defendants deny upon information and belief the allegations contained in paragraph 18 of the complaint.

20. That defendants deny the allegations contained in paragraph 19 of the complaint.

21. That defendants deny the allegations contained in paragraph 20 of the complaint.

22. That defendants deny the allegations contained in paragraph 21 of the complaint.

23. That defendants deny the allegations contained in paragraph 22 of the complaint.

24. That defendants deny the allegations contained in paragraph 23 of the complaint.

25. That defendants deny the allegations contained in paragraph 24 of the complaint.

As a first, separate and distinct defense to plaintiff's complaint, defendants allege:

26. That this court lacks jurisdiction over the subject matter raised in plaintiff's complaint.

As a second, separate and distinct defense to plaintiff's complaint, defendants allege:

27. That this court lacks jurisdiction under 28 U.S.C. 1331, §1343(3) and (4), 2201 and 2202; 42 U.S.C. §1981 and 1983, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States. That plaintiff's damages in this action cannot exceed $10,000 for reason that:

(a) Defendants' Sixth Defense stated hereafter shows that plaintiff's claim for damages is, to a legal certainty, for less than $10,000.

(b) That plaintiff elected his remedy for damages when plaintiff filed his petition for damages in Owen v. Roberts and Alberg, Case No. 778,640 before the Honorable Forest Hanna in the Circuit Court of Jackson County, Missouri.

[Designated Record 040]

(c) The dismissal of Lyle W. Alberg from the above-stated cause of action is a release of these defendants from any liability for damages.

(d) Plaintiff's stipulation that all matters in the above petition for damages have been fully compromised and settled as to the defendant Paul Roberts operates as a release of these defendants.

(e) That the filing and prosecution of said petition for damages in state court estops plaintiff herein from claiming damages against these defendants.

As a third, separate and distinct defense to plaintiff's complaint, defendants allege:

28. That plaintiff's complaint fails to state a claim against defendants upon which relief can be granted.

As a fourth, separate and distinct defense to plaintiff's complaint, defendants allege:

29. That no case or controversy involving the defendants has been pleaded sufficient to confer jurisdiction upon this court.

As a fifth, separate and distinct defense to plaintiff's complaint, defendants allege:

30. That the plaintiff has an adequate remedy at law.

As a sixth, separate and distinct defense to plaintiff's complaint, defendants allege:

31. That the defendants, and each of them, are absolutely immune from liability for damages; or, in the alternative, that the defendants, and each of them, are not liable for damages to plaintiff since the acts of the defendants, and each of them, were done in good faith or based upon probable cause. Further answering, defendants allege that the statements made by Paul Roberts at the April 17, 1972, regular meeting of the City Council were absolutely privileged.

WHEREFORE, these defendants demand judgment dismissing the complaint with costs.

* * *

CITY OF INDEPENDENCE PERSONNEL ACTION FORM

NATURE OF ACTION (CHECK ONE) NUMBERS IN PARENTHESIS INDICATE THE ITEMS BELOW TO BE FILLED OUT FOR EACH ACTION

___ TEMPORARY (1,2,4,5,6) ___ CERTIFICATION (1,2,3,4,5,6) ___ SALARY CHANGE (1,2,3,4,5,6) ___ LAY-OFF (1,2,3,5,6) ___ RESIGNATION (1,2,3,5,6) AND COPY OF RESIGNATION

___ PROVISIONAL (1,2,4,5,6) ___ PROMOTION (1,2,3,4,5,6) XX DISMISSED (1,2,3,5,6) ___ SUSPENSION W/O PAY (1,2,3,5,6)

___ PROBATIONARY (1,2,4,5,6) ___ DEMOTION (1,2,3,4,5,6) ___ TRANSFER (1,2,3,4,5,6) ___ LV. OF ABSENCE W/O PAY (1,2,3,5,6)

1. NAME George D. Owen

2. REQUESTED EFFECTIVE DATE April 19, 1972

3. PRESENT — TITLE Police Chief; SALARY RANGE NO. 57; STEP NO. F; AMT. $ 1387; DEPARTMENT Police Department

4. PROPOSED — TITLE; SALARY RANGE NO.; STEP NO.; AMT. $; DEPARTMENT

5. EXPLANATION OF ACTION AND/OR STATEMENT OF DUTIES TO BE PERFORMED. (IF TEMPORARY, SHOW EXPIRATION DATE)

Terminated under the provisions of Section 3.3(1) of the City Charter

24.0 Reg
32.0 CB
360.

5-22-73
P.S. DEPD
E + I
SW

6. REQUEST OF DEPARTMENT HEAD

SIGNED: _____ DATE: April 18, 1972

APPROVALS

PERSONNEL DIRECTOR _____ FINANCE DIRECTOR _____ CITY MANAGER _____

PLAINTIFF'S EXHIBIT NO. 2 - PERSONNEL ACTION FORM TERMINATING PLAINTIFF OWEN

PLAINTIFF'S EXHIBIT NO. 3 - LETTER, PLAINTIFF TO CITY MANAGER, APRIL 15, 1972

(SEAL) CITY OF INDEPENDENCE
Missouri 64050
103 North Main Street
Telephone (816) 836-8300
George D. Owen
Chief of Police
April 15, 1972

Mr. Lyle Alberg, City Manager
City of Independence, Missouri
103 North Main
Independence, Missouri

Sir:

As Director of Police and as Chief of Police of the City of Independence, I believe that you contemplate and may attempt to relieve me or force me out of office. This is occasioned by the fact that you have demanded my resignation which I have declined to submit. Further your attitude thereafter leads me to that belief. I have requested that you afford me a charge and specification of charges in writing and that I be granted a public hearing and a right to be represented by counsel.

My counsel, Lyman Field and Rufus Burrus, have advised me that even though the City Charter may give you authority to relieve me, they also say you cannot do so without granting me my constitutional rights of due process, which includes a written charge and specifications, together with a right to a public hearing and to be represented by counsel and to cross-examine those who may appear against me.

You are reminded, further, that I have given a lifetime to Police service and more than five years to the Independence Department. Further, you know that many civic and service organizations of Independence have at various times expressed confidence and praise of me and the Police Department.

You also know that the citizens and taxpayers of the City have given their vote of confidence of my administration of the Police Department by giving a great majority for the issuance of general obligation bonds in the amount of $2,000,000.00 for the construction of a police headquarters.

In spite of your recent investigation and your public statement given to the public press, your relief and discharge of me without a full public hearing upon written charges will leave in the minds of the public and those who might desire to have my services, a stigma of personal wrongdoing on my part.

Such action by you would be in violation of my civil rights as granted by the Constitution and Congress of the United States and you would be liable in damages to me. Further it would be in violation of the Missouri Administrative Procedure Act.

May I have an expression from you that you do not intend to relieve me or in the alternative give me a written charge and specifications of your basis for your grounds of intention to relieve me and to grant me a public hearing with a reasonable opportunity to respond to the charge and a right to be represented by counsel.

Respectfully,

PLAINTIFF'S EXHIBIT NO. 7 - PERTINENT EXCERPT FROM MINUTES OF REGULAR COUNCIL MEETING OF APRIL 17, 1972

REGULAR MEETING

APRIL 17, 1972

Bill No. 3463 entitled,

"AN ORDINANCE DECLARING THE RESULTS OF THE GENERAL CITY ELECTION HELD IN THE CITY OF INDEPENDENCE, MISSOURI, ON APRIL 4, 1972, AND AUTHORIZING AND DIRECTING THE CITY CLERK TO ISSUE ELECTION CERTIFICATES TO THE ELECTED CANDIDATES"

was given its first reading by title.

Bill No. 3464 entitled

"AN ORDINANCE DECLARING THE RESULT OF THE SPECIAL CHARTER AMENDMENT ELECTION HELD ON TUESDAY, APRIL 4, 1972, RELATIVE TO THE IMPLEMENTATION OF A PRIMARY ELECTION PRIOR TO THE BIENNIAL REGULAR CITY COUNCILMANIC ELECTIONS"

was given its first reading by title.

Bill No. 3465 entitled,

"AN ORDINANCE PROVIDING FOR THE CONSTRUCTION OF SIDEWALKS ON BOTH SIDES OF NOLAND ROAD FROM COLLEGE TO U.S. HIWAY 24, BY PAYING TO JACKSON COUNTY THE SUM OF $10,200 FOR CONSTRUCTION OF SAID SIDEWALKS AS SET FORTH IN THE

CHANGE ORDER #17 TO JACKSON COUNTY PROJECT #2010 AND BY PAYING TO SAID COUNTY THE SUM OF $800.00 FOR ENGINEERING FEES APPORTIONED TO SAID SIDEWALK CONSTRUCTION AND DECLARING AN EMERGENCY"

was given its first and second readings by title and placed on final passage. The question was asked, shall the bill pass? On roll call, the vote was: Ayes - Councilmen Maxwell, Bonville, Lamb, McGraw, Roberts, McQuinn and Mayor Weeks. Noes - none. Absent - none. The Mayor declared the bill passed.

Councilman Roberts read a prepared statement concerning the investigative report on the activities of the Chief of Police, certain Police officers and activities of one or more other City officials. Councilmen Roberts and McQuinn made a motion that the City Council instruct the City Manager to immediately make available to the news media, access to copies of all the twenty-seven voluminous investigative reports, the statements and attachments therewith; that copies of the reports be turned over and referred to the Jackson County Prosecuting Attorney for presentation to the next Grand Jury; and the City Council recommends to the City Manager that he take all direct and appropriate action permitted under the Charter against such persons as are shown by the investigation to have been involved in illegal, wrongful or gross inefficient activities brought out in the reports and that the investigation be completed. Councilman Bonville said he would not be in favor of releasing the information to the news media until such time as the entire Council could sit down and study the contents. He said he felt a study and decision should be made before the report is made public, otherwise the City could well be placed in a position of being libel. [sic] Councilman McGraw pointed out that a meeting of the

Council had been called some few days hence by the Mayor and the City Manager at which time the City Manager gave a statement which was released to the press and also indicated to the Council members that appropriate action would soon be taken. Councilman McGraw asked if other meetings had been held in which all the Council members had not been notified. Councilman McQuinn explained that it had not been an announced meeting that was held this morning (April 17, 1972), but that four Councilmen were in attendance for the purpose of considering immediate action to be taken on this very serious matter. Councilman Lamb voiced his opinion that the information be released to the public and the news media at once to dispel any thought that an attempt was being made to withhold the findings of the investigation. Councilman Maxwell affirmed his confidence in the City Manager and the plan under which he has set to follow through on this serious situation. He said that straightforward steps for correction need to be taken and that it is difficult to believe that the City has been a victim of such a circumstance. Councilman Bonville further explained that the matter should be legally checked out by our Law Department in order that the City not be held liable for defamation of character or any other damage; that he is not wishing to hide the facts, but to allow time for all precautionary measures to be taken. Councilman McGraw reiterated that a matter of this gravity should have been brought before the entire Council inasmuch as the City is represented by seven elected officials. Councilman Bonville asked City Counselor James S. Cottingham if the City would be placed in jeopardy of a lawsuit if the report is made available to the press at this time. Mr. Cottingham explained that there are a number of charges taken from various witnesses in which both accusations and evidence were induced and that if those charges of wrongdoing were not maintained and were printed in the news, there could be some action, not against the City, but against

individuals who gave the testimony. He said the City does have governmental immunity in this area and has the right to make inquiry and to investigate any department head or department within the City and neither the Council nor the City as a municipal corporation can be held liable for libelous slander. Councilman Lamb asked if the assumption is made that the City Manager has the right to take whatever action he deems necessary under a time schedule as he has set. Councilman Roberts replied that the motion is not specific as to the exact time for the City Manager to take the action mentioned, but that the motion's intent would take care of the matter. On vote, the motion carried with Councilman McGraw abstaining.

Councilmen McGraw and Lamb made a motion to approve the date of Monday, May 1, 1972 at 8:00 P.M. for the bid opening for the Blackburn School Park Development. Upon vote, motion carried.

Noted by the council was the approval that had been given for a total expenditure of $14,089.85 for a twelve month period, expiring 10/31/72 from Koppers Company, Inc. As of April 12, 1972 purchase orders had been issued in the total amount of $14,255.40 ($165.55 above the Council approved amount). A request for a new price agreement will be made at once.

At 8:09 P.M., Councilmen Lamb and McGraw made a motion to adjourn to the Memorial Building to meet in Adjourned Session as soon as possible after 8:00 P.M. for the Inauguration cermony. Upon vote, motion carried.

/s/ (Illegible)
Presiding Officer of the City Council of the City of Independence, Missouri.

ATTEST:
/s/ Bruce Lawrey
City Clerk

PLAINTIFF'S EXHIBIT NO. 8 - STATEMENT MADE APRIL 17, 1972 BY COUNCILMAN PAUL ROBERTS

On April 2, 1972, the City Council was notified of the existence of an investigative report concerning the activities of the Chief of Police of the City of Independence, certain police officers and activities of one or more other City officials. On Saturday, April 15th for the first time I was able to see these 27 voluminous reports. The contents of these reports are astoundingly shocking and virtually unbelievable. They deal with the disappearance of 2 or more television sets from the police department and signed statement that they were taken by the Chief of Police for his own personal use.

The reports show that numerous firearms properly in the police department custody found their way into the hands of others including undesirables and were later found by other law enforcement agencies.

Reports [s]how that narcotics held by the Independence Missouri Chief of Police have mysteriously disappeared. Reports also indicate money has mysteriously disappeared. Reports show that traffic tickets have been manipulated. The reports show inappropriate requests affecting the police court have come from high ranking police officials. Reports indicate that things have occurred causing the unusual release of felons. The reports show gross inefficiencies on the part of a few of the high ranking officers of the police department.

In view of the contents of these reports, I feel that the information in the reports backed up by signed statements taken by investigators is so bad that the council should immediately make available to the news media access to copies of all of these 27 voluminous investigative

reports so the public can be told what has been going on in Independence. I further believe that copies of these reports should be turned over and referred to the prosecuting attorney of Jackson County, Missouri for consideration and presentation to the next Grand Jury. I further insist that the City Manager immediately take direct and appropriate action, permitted under the Charter, against such persons as are shown by the investigation to have been involved.

I have been advised that the City Manager has requested the resignation of the Chief of Police but to date the Chief has not done so. It should be noted that many persons in the Police Department have come forward in the investigation of these matters and have cooperated in this investigation and their efforts are recognized and appreciated. Because these investigative reports and statements have not been available to the news media, I respectfully move as follows:

I move first that the Council instruct the City Manager to immediately make available to the news media access to copies of all the 27 voluminous investigative reports and the statements and attachments therewith.

Second:

That copies of the investigative reports be turned over and referred to the Jackson County Prosecuting Attorney for presentation to the next Grand Jury.

Third:

The City Council recommends to the City Manager that he should take all direct and appropriate action permitted under the Charter against such persons as are shown by the investigation to have been involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports, and to complete the investigation.

DEFENDANT'S EXHIBIT NO. 8 - LETTER, BURRUS TO VERMILLION, DATED APRIL 26, 1972

Law Offices of
BURRUS AND BURRUS
Katz Building
203 North Main
Independence, Missouri
64050

Olney Burrus
Rufus Burrus

Telephone
CLifton 2-9050

Harvey Burrus

April 26, 1972

Mr. George Vermillion
Personnel Director
City of Independence
Municipal Building
Independence, Missouri

RE: George D. Owen

Sir:

As attorney for Chief of Police, and also deignated as Director of Police Department, I am requesting that the attempted action by the City Manager to terminate the term of office of Chief George Owen be certified to the proper board as an appeal from such action.

If you should take the position that no such appeal applies, you are requested to give the reasons for such a position.

Again, this is given to you as an appeal on behalf of Chief George D. Owen.

Respectfully,

/s/ Rufus Burrus
Rufus Burrus

RBB:sjc

DEFENDANT'S EXHIBIT NO. 9 - LETTER, GILLHAM TO BURRUS, DATED MAY 3, 1972

(SEAL) CITY OF INDEPENDENCE
Missouri 64050
103 North Main Street
Telephone (816) 836-8300
May 3, 1972

Mr. Rufus Burrus
Burrus and Burrus
Attorneys at Law
203 North Main Street
Independence, Missouri 64050

Dear Mr. Burrus:

This is in response to your letter dated April 26, 1972, directed to Mr. George Vermillion, Personnel Director of the City of Independence, Missouri, requesting that the termination of the employment of Mr. George D. Owen as Director of Police be "certified to the proper board as an appeal from such action"

This is to advise that there is no appellate procedure or forum provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen.

Very truly yours,

/s/ James L. Gillham
James L. Gillham
Assistant City Counselor for the City of Independence, Missouri

JLG:alr
cc: Mr. George Vermillion,
Personnel Director

OPINIONS, DECISIONS, JUDGMENTS AND ORDERS

The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion and Judgment of the District Court, filed June 25, 1976 (as modified by order correcting clerical errors filed July 9, 1976) A46

Original Opinion and Judgment of Court of Appeals, filed August 15, 1977 A48

Prior Order of Supreme Court, filed June 26 1978 A79

Opinion of Court of Appeals on Remand, filed December 1, 1978 A1

ORDER OF COURT OF APPEALS DENYING REHEARING, FILED JANUARY 29, 1979

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1978

Nos. 76-1758 and 76-1799

George D. Owen,
Appellant/Cross-Appellee,

vs.

The City of Independence, Missouri, et al.,
Appellees/Cross-Appellants.

Appeals From the United States District Court for the Western District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant/cross-appellee, George D. Owen, and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

Five judges voted to deny the petition for rehearing en banc and Judges Heaney and Henley voted to grant the petition for rehearing en banc. Chief Judge Gibson did not participate in the consideration of the petition for rehearing with suggestions for rehearing en banc.

January 29, 1979

Supreme Court, U. S.
FILED
JUN 22 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1779

GEORGE D. OWEN,
Petitioner,

vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION
On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RICHARD G. CARLISLE
THOMAS D. COCHRAN
103 North Main
Independence, Missouri 64050
Attorneys for Respondents

JAMES S. COTTINGHAM
City Counselor

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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II. The Decision Below Is Consistent With The Decisions Of The United States Supreme Court, And With Decisions Of Other Courts Of Appeal Since *Monell,* On Whether Local Government Bodies And Individuals Sued In Their Official Capacity May Assert A "Good Faith" Defense To Suits Under 42 U.S.C. Sec. 1983 10

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1779

GEORGE D. OWEN,
Petitioner,

vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION
On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

QUESTIONS PRESENTED

Petitioner's narrow framing of the "Questions Presented" (Petition, p. 2) presents hypothetical and academic questions neither dispositive of this case nor, under the peculiar facts of this case, useful for application in other Section 1983 cases.

The factual situation giving rise to this litigation happened prior to decisions in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sindermann*, 408 U.S. 593 (1972). The passage of more than seven years since petitioner's discharge from nontenured, public employment

and the passage of a similar period of time since the issues were joined in this litigation, among other factors, may have moved the court of appeals to restrict its holdings on qualified immunity to "the particular circumstances of this civil rights action" (Petition, Appendix A, at p. A4). Consequently, neither the court of appeals nor the district court explored, in depth or for precedent in other cases, "the scope of any municipal immunity" left for another day in *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

Recognizing the mere existence, but not the contours, of a "good faith" defense under Section 1983, Title 42, United States Code (under three decisions of the United States Supreme Court), both the district court and the court of appeals left definition of "the boundaries" of some limited immunity for another case, whose circumstances could provide a less episodic and more current forum (App. at A4 and at A68, citing *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975); *Wood* v. *Strickland*, 420 U.S. 308 (1975); and, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974)).[1]

STATUTORY PROVISIONS INVOLVED

In this section of his petition, Petitioner Owen does not set forth verbatim, or refer to, any policy statement, ordinance, regulation or decision officially adopted and promulgated by the officers of the City of Independence, Missouri allegedly pertinent to the questions presented as required by Supreme Court Rule 23(1)(d).

---

1. The qualified immunity under *Scheuer* to defendant officials in this case, acting under color of state law sued in their *official* capacities, obviously presents an issue not stated in petitioner's "Questions Presented", where those questions limit the issues to the qualified immunity of officials in their *individual* capacities under *Wood*.

RESPONDENTS' STATEMENT OF THE CASE

As recognized by the court of appeals, the district court's findings of fact most accurately and clearly provide the background needed for understanding the issues presented in this case. These findings may be found at Appendix C, pp. A47-A60.

The Discharge

For a substantial period of time prior to March of 1972, Owen and the City Manager, defendant Alberg, had sharp disagreements over Owen's administration of the police department, including his administration of the property room (Appendix C, at A49). In early March, 1972, a handgun, which had been destroyed according to the property room records, was discovered in the hands of a felon. At that time the City Manager initiated an investigation of the property room. Statements were taken and reports made by the City Auditor and the City Counselor. The City Auditor reported that recordkeeping in the property room was too inefficient to make an adequate audit of the property therein. The City Counselor reported in writing to the City Manager that there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room (App., p. A49).

On April 10, 1972, the City Manager requested Owen to resign and to accept another position in the police department. Owen was informed that the City Manager was dissatisfied with his efficiency as police chief. When Owen refused to be rehired by the City, again on April 11, the City Manager fully advised Owen that he would be discharged if he did not resign. On April 13, the City Manager obtained the consent of another police officer to serve as police chief. On April 18, the City Manager implemented

his discharge decision by completing the necessary paperwork towards discharge.

On April 15, 1972, three days prior to Alberg's implementation of his discharge decision, Owen requested that Alberg provide him with written notice of the reasons for the termination and a hearing to appeal the discharge (App., p. A54).

The request was denied, however, because, beyond present dispute, Owen had no property interest in his position.

The Roberts Statement

Contemporaneously, but without any causal or policy connection[2] whatsoever to the City Manager's acts, a lame duck City Councilman, Roberts, unilaterally (App., p. A52) decided that the investigation should be made public and secretly drafted a statement to be made by him (without prior notice to anyone) at the City Council meeting on the evening of April 17, 1972. Such "charge", though Owen opposed a hearing as to its truth or falsity, was viewed by the majority in the court of appeal's opinion as damaging to Owen's reputation and future employment prospects (App., p. A41). Finding derivative liability because of Roberts' high ranking position (App., pp. A3 and A4), the court viewed this statement as the "City's public accusation" and held it to be "of prime importance" on the liberty issue (App., p. A32). The statement appears *passim* throughout the petition and selective references from it appear in Owen's Statement of the Case (Petition, p. 3).

Predictably, both the discharge and the Roberts statement obtained considerable media coverage. Petitioner

2. All members of the Council were prohibited by the Charter from having any voice in Owen's discharge process (App., p. A48).

(Petition at p. 4) has referred to various articles printed in area newspapers which were admitted conditionally at trial.[3]

The City Manager never made any stigmatizing allegations about Owen and no statements were placed in Owen's official record which could possibly stigmatize him. A copy of the Council motion, infra, and the vote on the motion became a part of the City's permanent records as journal entries of the Council meeting; however, a copy of the Roberts statement was not placed in the City's permanent records and, in any event, the City has had no request for records about Owen from prospective employers (Tr. at 81-82 and Tr. 229).

The City Manager did not subscribe to Roberts' accusations and publicly stated, as did the City Counselor, that there was no indication of any criminal wrongdoing or violation of law by Owen (App., pp. A14 and A51; Tr. 147; Tr. 224; Def. Ex. 11; Def. Ex. 14). Likewise, the discharge was not based upon Roberts' stigmatizing statement and nothing in the discharge process itself cast a stigma upon Owen (App., pp. A37, A44 and A56).

The Council Motion

During a regular Council meeting, the City Council for the City of Independence voted to refer "reports concerning police department inefficiencies" (App., p. A4) to the prosecuting attorney for presentation to the next grand jury. The City Manager subsequently complied with this Council motion; and, the grand jury then returned a "no true bill". Since that time, neither the City Manager nor

3. Defendants objected to these articles because they contained hearsay and were incompetent to show any state action (Tr. 25).

the City Council made any further investigation of Owen's administration of the police department (App., p. A56).

The Aftermath

At no time did Owen or his attorneys request a name clearing hearing and only informal hearings before the City Manager were given Owen.[4] Owen brought lawsuits both in the state and federal courts for compensatory relief. Roberts has never been a party to this federal action either in his individual or official capacity. Owen's action in the Missouri courts was against both Roberts and the City Manager.[5]

On June 25, 1976, the district court entered judgment for the individual defendants sued in their official capacities and for the City (Appendix C). On appeal, the United States Court of Appeals for the Eighth Circuit modified (Appendix B), based upon certain conclusions of law alluded to in Owen's Statement of the Case (Petition, pp. 4-5). Paradoxically, the court of appeals did agree with the district court that plaintiff was discharged "for reasons which apparently did not relate to Owen's honesty or integrity" (App., p. A37). Consequently, the court refused to afford "a full back pay remedy" which "would afford Owen a windfall at the expense of the municipality and the municipal taxpayers." Notwithstanding, the court believed that "some amount of compensatory relief" was appropriate against the City as a unit of government (but not

4. Indeed, although lack of such a hearing is apparently the constitutional tort Owen complains of here, Owen has never made a specific allegation in his complaint, or other request, for such a hearing.

5. Owen eventually dismissed the City Manager from the state case (along with allegations of a conspiracy between the City Manager and Roberts) and, subsequently, obtained a financial settlement against Roberts for the Roberts' statement on his petition for libel, slander and malicious prosecution.

against the individual officeholders) and remanded to the district court for a new trial on the issue of damages "measured by the amount of money he (Owen) likely would have received to retirement if he had not been deprived of his good name by the action of the City, subject to mitigation, including the amounts earned up to retirement age as well as the amount, if any, recovered from Councilman Roberts in the state defamation suit." (App., p. A38).

On June 26, 1978, this Court vacated (Appendix D) the court of appeals' prior decision for reconsideration in light of *Monell*, supra. On remand, the court of appeals affirmed (Appendix A) the judgment of the district court, denying Owen any relief against both the individual and corporate defendants in this case.

REASONS FOR DENYING WRIT

I

The Decisions Below, In Their Recognition Of The Existence Of Qualified Immunity To The Individual Defendants Sued In Their Official Capacity And To The City, Are Correct "In The Particular Circumstances Of This Civil Rights Action" Because Defendants Did Not Knowingly Neglect Any Duty To Plaintiff Where, In April Of 1972, Defendants Could Not Have Been Aware Of Any Affirmative Responsibility To Offer A Name Clearing Hearing To Plaintiff.

This litigation is part of the dwindling breed of Section 1983 cases predating *Roth* and *Sindermann*, supra. A few cases of similar ancestry may be pending in the lower federal courts which could ultimately involve the extremely limited type of qualified immunity applied in the

case at hand (App. p. A6 and p. A68); however, it is unlikely that even those cases bear any other significant relationship to this maverick among liberty interest cases.

Other cases, but not the case at hand, have viewed deprivation of liberty in the context of discharges which were based upon stigmatizing reasons. Other cases, but not the case at hand, have seen the existence of rules or understandings which denied expungement of stigmatizing materials from personnel records or have some other direct relationship to a constitutional tort—deprivations that were nurtured by official policy instead of violative of official policy as here. No other cases have viewed referral of investigative reports concerning departmental inefficiencies to the grand jury as a basis for liability. Other pre-*Monell* and pre-*Roth* cases involve suits against public officials in their individual capacities (to avoid the holdings of *Monroe*)—here no defendant was sued in his individual capacity (the alleged tortfeasor, Roberts, was not sued at all), leaving the issues undeveloped as to where individual liability for a constitutional tort ends and entity liability begins.

In the context of these, and other, unique aspects of this case, it is understandable why the majority limited its decision to the facts of this case. Problems in application of this case to other cases exist for various reasons—including the difficulty of discussing what exact custom, existing regulation or official policy is eligible to receive the benefit of qualified immunity. No policy involved in the City's discharge process has been identified, no policy enabling councilmen to make stigmatizing statements in speech and debate has been identified, and, in general, no policy denying name clearing hearings has ever been involved. Quite literally, plaintiff's theory is that somebody of high ranking position was guilty of an

act of omission thru their failure to offer plaintiff a name clearing hearing after the news media incorrectly linked the discharge to the Roberts' statement. Compare *Rizzo* v. *Goode*, 423 U.S. 362, 370 (1976).

No specific allegation has ever been made that any continuing official policy deprived plaintiff of a hearing. Indeed, plaintiff has never even requested a hearing. In other words, we are not dealing with a direct attack on the City's Charter, any City ordinance, written law, any practices of City officials that are so permanent and well settled as to constitute a custom or usage with the force of law, or any deeply embedded traditional ways of carrying out City policy.

Instead, when construed in the most favorable light to plaintiff, this case invovles nothing so formal as these types of official policy, but, instead, derivative liability of the City merely because the City Manager's and Roberts' isolated acts (though unconnected and non-continuing) were by high ranking officials. With the attenuated existence of official policy here, if indeed it does exist, it is within the sound exercise of judicial discretion, and equitable principles, to accord some form of qualified immunity, in a case limited to its own facts, as a defense to retroactive, compensatory relief (as opposed to prospective relief seeking to enjoin future enforcement of the policy itself).

Any other decision would have rendered the City retroactively and strictly liable as insurer for a virtually infinite number of causes of action. Without some form of immunity the net effect would have been to pull immunity out by its roots and throw away the whole. All a plaintiff would have to do is to sue the City for any one incident involving the City's high ranking officials; and, even though the official himself may have broad

immunity (historically derived, of course, from the city itself), the plaintiff's mere selection of parties would circumvent that immunity. The federal government would continue to have sovereign immunity, state government would continue to have Eleventh Amendment immunity, but local government would be fair game. Indeed, under plaintiff's theories (as to Roberts' alleged involvement in the discharge process), local government would be without a defense even if its high ranking officials acted in the face of written policy and beyond their scope of authority.

The discharge, the Roberts' statement and the council motion preceded *Roth*. The defendants were without the wherewithal to reasonably have known that the Roberts' statement could fairly be said to represent official policy. The defendants could not have known that the Roberts' statement would be connected with the discharge. The first definitive holding that the Roberts' statement required a due process hearing was with the court of appeals' reversal of the district court's holding to the contrary in August of 1977 (App., p. A26). Accordingly, the defendants did not have reason to know in April of 1972 that their actions would later be held to have violated Owen's constitutional rights.

II

The Decision Below Is Consistent With The Decisions Of The United States Supreme Court, And With Decisions Of Other Courts Of Appeal Since *Monell*, On Whether Local Government Bodies And Individuals Sued In Their Official Capacity May Assert A "Good Faith" Defense To Suits Under 42 U.S.C. Sec. 1983.

In *Scheuer* v. *Rhodes*, supra; *O'Connor* v. *Donaldson*, supra; *Wood* v. *Strickland*, supra; *Procunier* v. *Navarette*, 434 U.S. 555 (1978); *Tenney* v. *Brandhove*, 341 U.S. 367

(1951); *Barr* v. *Mateo*, 360 U.S. 564 (1959); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Butz* v. *Economou*, 438 U.S. 478 (1978); and, *Pierson* v. *Ray*, 386 U.S. 547 (1967); this Court has consistently recognized the existence of immunities to individuals sued in either their individual or official capacities. Little would be served by detailed discussion of each of these cases—our purpose here is to merely identify the unbroken chain of decisions accepting the need for application of some form of qualified immunity under circumstances similar to those involved here. Indeed, the court in *Monell*, at footnote 55, expressly affirms their precedential value where these cases discuss immunity to individuals sued in their official capacity (as is the case here), by holding:

> "Since official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent—at least where eleventh amendment considerations do not control analysis—our holding today that local governments can be sued under Section 1983 necessarily decides that local government officials sued in their official capacities are 'persons' under Section 1983 in those cases in which, as here, a local government would be suable in its own name."

Taking merely one of these above-quoted decisions as an example, we suggest that the logic behind this quote forbids applying good faith immunity to an individual sued in his official capacity, but not applying the same principles to the entity itself. *Scheuer* v. *Rhodes*, supra, at 246. Qualified immunity broadens in relation to the level at which the official serves in government. However, the rule proposed by plaintiff would have the absurd result of controverting this holding in *Scheuer* in direct relation to the extent with which its test is met—qualified im-

munity would abate in relation to the level at which the official serves in government. In sum, "it would be anomalous to establish a greater degree of immunity for municipal officials than is given to the city itself." *Crowe* v. *Lucas,* 595 F.2d 985, 989 (5th Cir. 1979).

Literally every circuit decision after *Monell* has recognized the existence of some form of qualified immunity to high ranking officials. In *Bertot* v. *School District No. 1, Albany County, Wyoming,* Slip Opinion No. 76-1169 (vacated pending rehearing en banc) Chief Judge Seth held:

> "The reasons for the application of the doctrine of qualified immunity are as compelling when considering the members individually as they are to the evaluation of the members acting collectively. * * * It is apparent that conscientious board members will be just as concerned that their decisions or actions might create a liability for damages on the board or the local entity as they would on themselves. The restriction on the exercise of independent judgment is the same. The individuals are the same in whatever capacity, their good faith is the same in each capacity whether it is individual good faith, board good faith when considered collectively, or official capacity good faith."

See also *Skehan* v. *Board of Trustees of Bloomsburg State College,* 590 F.2d 470 (3rd Cir. 1978); *Princeton Community Phone Book, Inc.* v. *Bate,* 582 F.2d 706 (3rd Cir. 1978); and, *Crowe* v. *Lucas,* supra. Lest the above-cited Supreme Court decisions be drained of meaning, some form of immunity to high ranking officials, sued in their individual or official capacities, must be extended to local government bodies. Otherwise, under the holdings of the majority in

Owen, the City would be strictly liable merely because the constitutional tort was by a high ranking official. Compare *Paul* v. *Davis,* 424 U.S. 693 (1976).

III

Denying Equitable And Declaratory Relief And Denying Attorneys Fees To Petitioner Was Within The Sound Discretion Of The Court Of Appeals.

Exploring all of the issues and facts which may have moved the court of appeals to deny equitable and declaratory relief and attorneys fees to petitioner would involve a lengthy discussion of the case on its merits. Suffice it to say that the court of appeals could justifiably view this case as nothing more than a suit for money. Moreover, such denials are wholly within the discretion of the court of appeals and hardly raise special and important questions of constitutional dimensions which require review by the Supreme Court. *Hostrop* v. *Board of Junior College District No. 515,* 523 F.2d 569 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976); *Public Affairs Association, Inc.* v. *Rickover,* 369 U.S. 111 (1962); *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 540 (1945); *United Public Workers of America (CIO)* v. *Mitchell,* 330 U.S. 75 (1947); and, *Skehan,* supra.

CONCLUSION

Treating the Supreme Court's prior vacating order in this case (App., p. A79) as a decision on the merits, see *Board of Trustees of Keene State College* v. *Sweeney,* ..... U.S. ....., 99 S. Ct. 295, 58 L.Ed.2d 216 (1978) (Stevens, J., dissenting), the court of appeals, under the particular circumstances of this case and in light of *Monell,* prop-

erly recognized the existence of qualified immunity to the City of Independence.

Respectfully submitted,

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In the Supreme Court of the United States

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals on Remand is reported at 589 F.2d 335 and is printed at Pet. App. A1-A7. The prior opinion of the Court of Appeals is reported at 560 F.2d 925 and is printed in Pet. App. A8-A45. This Court's previous memorandum order is reported at 438 U.S. 902, 98 S.Ct. 3118, 57 L.Ed.2d 611, and is printed at Pet. App. A79. The opinion of the District Court is reported at 421 F.Supp. 1110 and is printed at Pet. App. A46-A78.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 1, 1978. Petition for rehearing was denied by a divided court on January 29, 1979. The time for filing a petition for writ of certiorari was extended to May 29, 1979 by order of Justice Blackmun signed April 10, 1979. The petition for writ of certiorari was filed on May 29, 1979, and granted October 1, 1979. The jurisdiction of this Court rests at 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should the qualified immunity available to local officials in their individual capacities under *Wood v. Strickland* be extended to local governmental bodies?

2. If qualified immunity is extended to municipalities, should it be further extended to bar declaratory and equitable relief as well as damages?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT[1]

On and before April 18, 1972, petitioner was employed as the chief of police of Independence. Under Section 3.3(1) of the city charter, he could be removed by the city manager only "when deemed necessary for the good of the service." (Pet. App. at A32)

During a city council meeting on April 17, 1972, Paul Roberts, in his capacity as city councilman, read a written statement "impugning Owen's honesty and integrity." (Pet. App. at A31) The statement alleged that Owen had misappropriated police department property, that narcotics had "mysteriously" disappeared from his office, and that high ranking police officials had made "inappropriate" requests affecting the police court. It also alleged manipulation of traffic tickets, the "unusual release of felons" and the mysterious disappearance of money. As part of his statement, Roberts moved that certain "investigative reports" allegedly supporting the allegations be turned over to the prosecutor for presentation to the grand jury, that they be released to the press and that the city manager take "direct and appropriate action" against those "involved in illegal, wrongful, or gross inefficient activities." The full text of the statement and motion is set forth in the Appendix at 24-25.

The city council by official action passed the motion with one abstention and no dissents, thus lending its support to Roberts' charges. (Pet. App. at A16, A31) The following day, the city manager discharged Owen. (Pet. App. at A26) The discharge notice contained no reason for the discharge but stated simply that Owen was "[t]er-

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1. Throughout this brief, "Pet. App. at ....." shall refer to the Appendix to the Petition for Certiorari, "App. at ....." shall refer to the Joint Appendix, and "Tr. ....." shall refer to the transcript of testimony.

minated under the provisions of Section 3.3(1) of the City Charter." (P.Ex. 2, App. at 17, Tr. 18, Pet. App. at A31) The city manager reinforced the council's implication that Owen was guilty of wrongdoing by publicly announcing that he was referring the reports of alleged police department inefficiency to the prosecutor for submission to the grand jury. (Pet. App. at A3-4, Pet. App. at A31, n. 11) He did not disavow the charges or the council's actions or take any steps to contradict reports that Owen's discharge was the direct result of the alleged misconduct.

The press and public were present at the April 17, 1972 city council meeting. (Tr. at 12, 49, 82 and 189) Copies of the statement and motion were distributed to them. The statement, motion and firing received widespread publicity. (Pet. App. at A31) The area newspapers printed the statement and motion substantially verbatim and reported the adoption of the motion. Front page articles appeared for several days under headlines such as "Lid Off Probe, Council Seeks Action" (Independence Examiner, April 18, 1972, P.Ex. 5, Tr. 25); "Independence Accusation. Police Probe Demanded" (Kansas City Times, April 18, 1972, P.Ex. 6, Tr. 25); "Probe Culminates in Chief's Dismissal" (Independence Examiner, April 19, 1972, P.Ex. 13, Tr. 27) and "Police Probe Continues; Chief Ousted". (Community Observer, April 20, 1972, P.Ex. 14, Tr. 27) A copy of the statement and motion was placed in the City's permanent records. (Tr. at 81-82)

Owen twice requested a hearing. (Pet. App. at A16-17, Pet. App. at A54-56, P.Ex. 3, App. at 18-19, Tr. 22, D.Ex. 8, App. 26, Tr. 173) His request for a hearing was denied by the City by letter dated May 3, 1972 from the city counselor's office. (Pet. App. at A4 and A17) The City never provided Owen with a hearing to vindicate his name. (Pet. App. at A5) The grand jury subsequently returned a no true bill.

Owen brought suit under 42 U.S.C. §1983, and the Fourteenth Amendment asserting jurisdiction under 28 U.S.C. §1331, 28 U.S.C. §1343(3) and 28 U.S.C. §1343(4). He sought declaratory and equitable relief, including a hearing on his discharge, back pay and attorney's fees. The District Court entered judgment for defendants (Pet. App. at A46)

Or appeal, the United States Court of Appeals for the Eighth Circuit reversed, ordering the entry of a declaratory judgment that Owen's discharge had deprived him of liberty without due process of law. In lieu of an award of full back pay, it ordered equitable compensation measured by the amount Owen would have earned to retirement if he had not been deprived of his good name by the actions of the City, less mitigation. The Court of Appeals held that the District Court had jurisdiction under 28 U.S.C. §1331 to grant equitable relief for Owen's Fourteenth Amendment claims. The court found it unnecessary to decide whether 28 U.S.C. §1343 and 42 U.S.C. §1983 provided an additional basis for jurisdiction. (Pet. App. at A22)

On June 26, 1978, this Court vacated the Court of Appeals' prior decision for reconsideration in light of *Monell v. Department of Social Services*, 436 U.S. 658 (1978). On remand, the Court of Appeals found that the City of Independence was subject to suit under *Monell* since the actions in question were those of the City's highest ranking officials. (Pet. App. at A3-4) It again found that petitioner had been deprived of his constitutional right to liberty without due process. It reaffirmed its prior finding that the City stigmatized Owen. (Pet. App. at A3) It further found that "such conduct amounted to official policy causing the infringement of Owen's constitutional rights, in violation of §1983." (Pet. App. at A4)

However, the Court of Appeals ruled that petitioner should be denied all relief on the basis that the City was entitled to qualified "good faith" immunity. The court held that a city was entitled to such immunity for violations of any right unless the right had been expressly declared by Supreme Court decision prior to the city's action.[2] The Court rejected petitioner's contentions (a) that the defense of "good faith" is limited to officeholders in their individual capacities and does not extend to governmental entities, (b) that qualified immunity does not forbid the granting of equitable relief, and (c) that qualified immunity does not justify refusal to issue a declaratory judgment. Rehearing and rehearing *en banc* were denied by a vote of five to two.

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2. The Court concluded that, prior to *Roth* and *Sindermann*, the City could not have known that its actions violated Owen's rights despite recognizing that:

> "Before Owen's discharge, the Supreme Court appeared to find a liberty interest '[w]here a person's good name, reputation, honor, or integrity [was] at stake because of what the government [was] doing to him,' which, when infringed, required the Government to provide the individual with notice and an opportunity to be heard. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). However, not until the *Roth* and *Sindermann* cases did the Court first recognize that a public employee, in the context of being terminated under circumstances imposing a stigma on his professional reputation and impairing his ability to find future employment, was entitled to notice and a name-clearing hearing." (Pet. App. at A67 n. 1) (Bracketed material in opinion)

SUMMARY OF ARGUMENT

Municipalities are entitled to qualified immunity in suits under 42 U.S.C. §1983 only if they enjoyed a firmly established, well-recognized qualified immunity at common law and that common law immunity was supported by policy considerations which would be equally persuasive in the context of §1983. No such common law qualified immunity for municipalities existed. Moreover, the policy considerations which supported those immunities which did exist (e.g. the qualified immunity of local officials) are entirely unpersuasive in the context of §1983 actions against local governmental entities.

The language of 42 U.S.C. §1983 allows for no immunities. It provides that "every person" shall be liable and makes no distinctions among defendants. However, this court has recognized that some government officials do enjoy certain immunities in §1983 actions. None of these immunities has been created by judicial fiat. Each has been the result of a considered judgment that the particular immunity was so thoroughly ingrained in the common law and its rationale so applicable to §1983 that Congress would not have abrogated it without doing so expressly. Congress's silence cannot be deemed to have created new immunities or to have conferred them on those who did not have them at common law.

In 1871, cities enjoyed no qualified immunity. As the 42nd Congress knew, suits against cities—both in tort and contract—were a frequent occurrence. There appear to have been no cases holding or stating that a city was exempted from liability because its officials held a good faith belief that their actions were lawful. In the few cases in which the situation arose or was discussed, the court held or stated that the city remained liable despite the reasonable beliefs of its officials. The leading

case to that effect, *Thayer v. Boston*, 19 Pick. 511 (1837) was actually cited in the debates on the Act. The members of the 42nd Congress were well-versed in the common law. The fact that no member mentioned any form of immunity available to municipalities while members did discuss immunities available to public officials is a strong indication that no municipal immunities existed.

Since cities enjoyed no qualified immunity, Congress's silence cannot be deemed to have conferred one on them. This is particularly true since the policy considerations which supported qualified immunity for officials would not have supported a similar immunity for municipalities. It is unfair to force a city official to bear the cost of a reasonable mistake made in the pursuit of the city's interests; but it is eminently fair that the city bear the cost of that mistake just as it would have received the benefit of the official's act if it had been held lawful. While even a small risk of personal financial loss may paralyze municipal officials, even substantial risk of municipal loss has no such effect. Municipal officials regularly face and weigh such risks and there is no reason to believe that Congress would have wanted the risk of constitutional harm to receive less consideration than other risks. Finally, the risk of municipal immunity will not deter capable candidates from seeking public office. Instead, it will give the voter an incentive to elect officials who give due consideration to the constitutional risks of their actions. Moreover, there is evidence in the debates that Congress intended to provide a remedy for violations of constitutional rights even if those rights had not been articulated by judicial decision. Since official immunity precludes obtaining that remedy from the officials involved, Congress must have intended that the relief be granted against the municipality itself.

ARGUMENT

I

The Significance of *Monell* in Defining the Considerations Applicable to Decision of the Issues Presented.

In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690 (1978) this Court specifically held from the legislative history that local municipalities are "persons" suable under §1983.

> "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom §1983 applies." (Emphasis in opinion)

It is clear from *Monell* that the Civil Rights Act of 1871 was a remedial act and to be liberally and benefically construed, as intended by the 42nd Congress. It was intended to give a broad remedy for violations of federally protected rights. *Id.* at 684-685. The Eleventh Amendment is no bar to municipal liability and there is no other constitutional impediment to municipal liability. *Id.* at 687. Local governing bodies may be sued directly under §1983 for monetary, declaratory, or injunctive relief where the action alleged to be unconstitutional implements, as here, a decision officially promulgated and adopted by that body's officers. *Id.* at 691. Municipalities can assert no reliance claim to support an absolute immunity. *Id.* at 699-700.

Proceeding further in its analysis of the legislative history of the Act, the court concluded that "a municipality cannot be held liable *solely* because it employs a tortfeasor - or in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory." *Id.* at 696.

It so concluded from its reading of the language of the Act that "any person who . . . *shall subject or cause to be subjected,* any person to the deprivation of any rights . . ." (Emphasis in opinion).

This court went no further in its holding as to municipal liability under §1983:

> "In so doing, we have no occasion to address, what the full contours of municipal liability under §1983 may be. We have attempted only to sketch so much of the §1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases and *we expressly leave further development of this action to another day.*" *Id.* at 695 (Emphasis added)

Nor did the Court even suggest in *Monell* that public treasuries should have qualified immunity. On the contrary, the Court made clear that it was *not* indicating whether any immunity should be afforded public treasuries when it stated (*Id.* at 701):

> "[*W*]*e express no views* on the scope of *any* municipal immunity beyond holding that *municipal bodies sued under §1983 cannot be entitled to an absolute immunity,* lest our decision that such bodies are subject to suit under §1983 'be drained of meaning.' *Scheuer v. Rhodes,* 416 U.S. 232, 248 (1974). Cf. *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 389, 397-398 (1971)." (Emphasis added)

It is thus settled law that cities have no absolute immunity under §1983.

II

Municipalities Are Not Entitled to Qualified Immunity in Suits under 42 U.S.C. §1983 Unless They Enjoyed a Firmly Established, Well-Recognized Qualified Immunity at Common Law and That Common Law Immunity Was Supported by Policy Considerations Which Would Be Equally Persuasive in the Context of §1983.

The questions presented in this case are one of "construction of a federal statute." *Wood v. Strickland,* 420 U.S. 308, 314 (1975). This Court must look to the legislative history of §1983 and the common law prior to 1871 to determine what rights the 42nd Congress intended to protect by judicial relief and what limitations it intended to place thereon.

As to any class of defendants, there has always been a strong initial presumption that it enjoys no form of immunity under 42 U.S.C. §1983. The language of the section is absolute and "on its face admits of no immunities. . . ." *Imbler v. Pachtman,* 424 U.S. 409, 417 (1976). It provides that "every person" shall be liable and makes no distinctions among defendants. Defendants were to be liable "in an action at law, suit in equity, or other proper proceeding for redress," and the members recognized that monetary relief was among the remedies provided. See, e.g. Cong. Globe, 42d Cong., 1st Sess., App. at 217 (hereinafter "Globe App."). The act was to be liberally construed to accomplish its remedial purposes and its language was to be given "the largest latitude consistent with the words employed . . . ." Globe App. at 68; *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 684 (1978); *Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391, 400 at n. 17 (1979). In light of §1983's absolute language

and remedial purposes, no immunity has been recognized unless the particular immunity was so thoroughly ingrained in the common law and its rationale so applicable to §1983 that Congress could not have intended to abrogate it without expressly declaring its intent. An immunity has been recognized only when the Court has found itself unable to "believe that Congress . . . would impinge on a tradition [of immunity] so well grounded in history and reason by covert inclusion in the general language [of §1983]." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). With respect to each such immunity the Court has concluded that "Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

The first requirement is that the particular immunity was known to be available to the defendant at common law. Congress could not have intended, by its silence, to create an immunity that was unknown to the common law and thus to Congress itself. If its silence did not change the common law to abolish immunities, it surely did not change the common law to create or extend them.

In each case in which this court has held that a type of public official enjoyed a form of immunity, it has based that holding on the existence of a common law immunity. In *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), the court stated that legislative immunity had "taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." The court traced the history of the immunity from England, through colonial times, and into the Constitution itself. It concluded that it could not "believe that Congress . . . would impinge on a tradition so well founded in history and reason by covert inclusion in the general language before us." *Id.* at 376.

In *Pierson v. Ray*, 386 U.S. 547, 553, 554 (1967), the court stated that "[f]ew doctrines were more solidly established at common law than the immunity of judges . . . ." The court held that judicial immunity, and the common law immunity of policemen when acting in good faith and with probable cause, were preserved by §1983.

In *Scheuer v. Rhodes*, 416 U.S. 232, 239 at n. 4, 246 at n. 8 (1974) and *Wood v. Strickland*, 420 U.S. 308, 318 (1975), the court held that executive officials and school board members had enjoyed at common law only a limited or qualified immunity. In each case, the immunity recognized under §1983 was essentially that recognized at common law. *Imbler v. Pachtman*, 424 U.S. 409, 419 (1976). In *Imbler*, the Court reviewed its prior decisions on immunities and stated that "each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.* at 421.

If, as in the present case, the immunity claimed by the defendant is one which it did not enjoy at common law, that properly ends the inquiry. If, on the other hand, the defendant did enjoy the immunity at common law, the court has gone on to determine whether the considerations underlying that common law immunity were sufficiently persuasive in the context of §1983 to justify the inference that Congress must have intended to preserve the immunity. Thus, in *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976), the court, after determining that prosecutors enjoyed absolute immunity at common law, went on to say: "We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance [the] immunity under §1983." The inference that the 42nd Congress intended to preserve an existing common law immunity can be drawn only if the justification for that immunity is equally persuasive in the context of §1983.

III

Municipalities Did Not Enjoy Qualified Immunity Under the Common Law in 1871.

In 1871, cities enjoyed no qualified immunity. Cities were frequently sued—both in tort and contract. Suits against municipalities to enforce the contract clause were well known to the 42nd Congress. *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 673 and n. 28 (1978); Globe App. at 314-315; Cong. Globe, 42d Cong., 1st Sess. 751-752 (hereinafter "Globe"); Globe 777. Suits against cities for personal injury, though of less general public interest, were also frequent and were discussed in the debates. See, e.g. Globe 788; Globe 792.

There appear to have been no cases holding or stating that a city was exempted from liability because its officials held a good faith belief that their actions were lawful. On the contrary, when cities were sued, they were liable on the same basis as individuals. Senator Stevenson, quoting *Prather v. Lexington,* 13 Ben. Monroe's Kentucky Reports 559, 560 (1852), stating the prevailing law as follows:

> "Where a particular act, operating injuriously to an individual, is authorized by a municipal corporation, by a delegation of power either general or special, *it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action against an individual.* But as a general rule a corporation is not responsible for the unauthorized and unlawful acts of its officers, although done under the color of their office; to render it liable it must appear that it expressly authorized the acts to be done by them, or that they were done in pursuance of a general authority to act for the corporation on the subject to which they relate. (*Thayer v. Boston,* 19 Pick. 511.) It has also been held that *cities are responsible to the same extent, and in the same manner, as natural persons* for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for their benefit." Globe 762 (Emphasis added)[3]

Senator Stevenson's reference to *Thayer v. Boston,* 19 Pick. 511 (1837) is significant. *Thayer* was a leading case in which the Massachusetts Supreme Court declared that a municipality would be held liable in a tort action despite the good faith belief of its officials that they were acting lawfully. The court stated:

> "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make

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3. The second sentence of the passage quoted above does identify one way in which municipalities were treated in a different manner than ordinary defendants: they were not held to the strict rigor of *respondeat superior.* In a striking parallel to *Monell,* Senator Stevenson indicated that cities would not be liable simply because their employees committed a tort, but would only be liable if the employee had been expressly authorized to commit the wrong (cf. "official policy" under *Monell*) or was an officer with general authority to act for the city (cf., those "whose edicts or acts may fairly be said to represent official policy" under *Monell*).

good the damage sustained by an individual, in the consequence of the acts thus done." *Id.* at 515.

Thayer was not an aberration. In *Hurley v. Town of Texas*, 20 Wis. 634, 637-638 (1866), the Supreme Court of Wisconsin quoted *Thayer* with approval and permitted recovery despite the good faith of the town officials. (The officials had been placed in the awkward position of having to follow two statutes which gave irreconcilably contradictory instructions on the same subject.)

In *Lee v. Village of Sandy Hill*, 40 N.Y. 442 (1869), the New York Court of Appeals applied the same principle to a case in which village trustees had removed a landowner's fence. The court expressly found that the trustees had acted in good faith and not willfully. *Id.* 450, 451. Nonetheless, it held that, "[i]n such a case, the corporation is liable." *Id.* 452.

Similarly, in *Squiers v. Village of Neenah*, 24 Wis. 588, 593 (1869), the court held the village liable for trespass, stating:

> "The proceeding, therefore, although unlawful, was not one which was so known or understood at the time. It was a proceeding on the part of public officers having, under the circumstances supposed, competent authority to act upon the general subject-matter and whose acts were performed with an honest view to obtain for the public a lawful benefit or advantage. The case presented, therefore, is one falling fully within the principle stated in *Thayer v. Boston* . . . ."

Another example is *McCombs v. Town Council of Akron*, 15 Ohio 474, 479 (1846) in which the Supreme Court of Ohio held that a municipality could be liable even though its officials' actions were "unattended by any circumstance of negligence or malice."

The fact that the debates of the 42nd Congress reveal no discussion of qualified immunity for municipalities is strong evidence that no such immunity existed. Nowhere in the debates on the Civil Rights Act of 1871 does any Member of Congress suggest that a municipality was exempt from liability for injury resulting from acts of its officials because those officials reasonably believed those actions to be lawful. The Members were steeped in the common law and thoroughly familiar with the immunities it granted. Where a broad interpretation of §1 of the Act would impair one of those immunities, opponents of the Act were quick to point it out. Opponents argued that the Act should be defeated because §1 could be interpreted to abolish judicial immunity—to reverse "the old maxim of the law that a judge for any judgment he gives can only be liable to impeachment . . . and [to permit] that judge to be dragged into Federal Court to be mulcted in damages . . . ." Globe App. 217; Globe 365-366. They charged that §1 would impinge on legislative immunity, interfering with freedom of legislative debate. Globe App. 217; Globe 365. They charged it would make governors (Globe 365), sheriffs (Globe 365), and other public officers (Globe 385) liable despite their good faith—liable despite "acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error in judgment . . . ." Globe 365; Globe 385.

Thus, Act opponents argued that §1 could be deemed to infringe the common law immunities enjoyed by public officials. If there had been an immunity exempting municipalities from liability for their officers' good faith actions, the opponents would not have hesitated to point out—as another reason to vote against the Act—that §1 could be interpreted to violate that immunity as well. That no such argument was made is further strong evidence that no such immunity existed.

IV

The Considerations Supporting Immunity for Officials Do Not Support Creation of Such an Immunity for Cities.

A. The Considerations Discussed in This Court's Prior Official Immunity Cases Do Not Support Municipal Immunity.

The 42nd Congress could not have intended its silence to be interpreted to create an immunity for cities which was unknown to the common law and to Congress itself. If express statutory language was required to repeal an immunity which a defendant had at common law, surely express language was required to create an immunity which the defendant did not have. Cities were not immune from liability for actions taken by their officers in good faith belief that the actions were lawful. Properly speaking, that fact ends the inquiry. Defendants are not free to claim an immunity which Congress did not intend them to have, just because defendants think that the immunity might serve the public interest.

In each of its §1983 immunity cases, this court has explored the considerations supporting the immunities against personal liability afforded officials at common law. *Tenney v. Brandhove,* 341 U.S. 367, 373-374 (1951); *Pierson v. Ray,* 386 U.S. 547, 554-555 (1967); *Scheuer v. Rhodes,* 416 U.S. 232, 239-242 (1974); *Wood v. Strickland,* 420 U.S. 308, 319-320 (1975); *Imbler v. Pachtman,* 424 U.S. 409, 424-429 (1976). But it has done so only after finding that the defendant was afforded the personal immunity by the common law and only for the purpose of determining whether the purposes of the common law immunity were equally applicable in suits against the defendant under §1983. In no case has this court suggested that it would be appropriate to superimpose an immunity on the structure

of §1983 simply because it seemed sound public policy to do so. *Imbler v. Pachtman, supra* at 421.

But even if public policy reasons could provide an independent ground for recognizing an immunity unknown to the 42nd Congress, no qualified immunity for cities would be justified. Three reasons have generally been given for qualified official immunity: First, that personal liability would deter officials from acting forcefully and in the public interest. *Scheuer v. Rhodes,* 416 U.S. 232, 240 (1974); *Wood v. Strickland,* 420 U.S. 308, 319-320 (1975). Second, that personal liability would deter the most capable candidates from seeking office. *Id.* at 320. Third, that imposing personal liability for acts done in the good faith pursuit of public benefits is unfair to public officials. *Id.* at 319; *Scheuer v. Rhodes, supra* at 240.[4] None of these reasons have force when the liability in question is municipal rather than personal.

The risk of personal loss for actions taken in good faith may have a paralyzing effect on government officials. The risk of municipal loss does not. City officials regularly make decisions which, if wrong, may impose substantial costs on the city treasury. Public officials fire employees every day even though they know that the city will have to pay for their action if a civil service commission or state court or grievance panel finds that the firing was unjustified or procedurally improper. City

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4. The Court's decisions granting absolute immunity have articulated similar reasons underlying it. In *Tenney v. Brandhove,* 341 U.S. 367, 373-374 (1951), the court held that absolute legislative immunity enabled legislators "to execute the functions of their office without fear of prosecutions, civil or criminal." In *Pierson v. Ray,* 386 U.S. 547, 554 (1967), the court said that personal liability "would contribute not to principled and fearless decision making but to intimidation." In *Imbler v. Pachtman,* 424 U.S. 409, 424-425 (1976), the court said that absolute immunity was needed so that prosecutors would not be "constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."

officials build airports knowing that inverse condemnation suits could cost the city hundreds of thousands of dollars. Selection of the wrong contractor for a public project, or of a less expensive but less comprehensive form of insurance for public buildings, or of one rather than another date to issue municipal bonds can impose costs on a municipality that would dwarf the cost of a judgment under §1983. Nonetheless, the risks are weighed, alternatives are analyzed and decisions are made.

It is perfectly appropriate that constitutional risks be included in this decision-making calculus. It would be strange if constitutional rights were to be given less weight than contractual or statutory rights. The purpose of qualified personal immunity for officials is not to let them disregard the risk of constitutional harm. Rather, it is to insure that public officials can make decisions on the close constitutional questions that come before them without having their judgment clouded by personal considerations, i.e. the risk of personal financial loss. The inhibiting effect of this risk is entirely eliminated by the decisions granting immunity to the official himself. There is no need to extend the immunity to cover the city treasury as well.

With constant re-examination of constitutional principles as part of the democratic process, it is in the public interest that persons not be discouraged from seeking constitutional rights as yet undeclared or from seeking to correct constitutional wrongs not yet fully defined. Such efforts will be greatly discouraged if a constitutional right is found to exist and to have been violated, but the harm goes without redress.

It is not a criticism of city officials to suggest that few airports would be built if the officials were personally liable in all ensuing inverse condemnation suits. Yet

it has never been suggested that good faith is a defense available to the city treasury in such a case.[5]

The contrast between the effect of personal and municipal liability was recognized in *Thayer v. Boston,* 19 Pick. 511, 515-516 (1837). After stating that the city could be liable in its corporate capacity despite the reasonable belief of its officers that their actions were lawful, the court went on to say that, in the same situation, personal liability

> "would be harmful to the city itself, in its corporate capacity, by paralyzing the energies of those charged with the duty of taking care of its most important rights, inasmuch as all agents, officers and subordinate persons, might well refuse to act under the direction of its government in all cases, where the act should be merely complained of, and resisted by an individual, on whatever weak pretence . . . ."

As previously noted, the *Thayer* decision was not unknown to Congress. Globe 762.

The second consideration justifying qualified immunity—that it might deter qualified candidates from seeking office—is equally inapplicable when the liability imposed is municipal rather than personal. Unlike personal liability, municipal liability does not raise the prospect of "heavy burdens upon their private resources . . . ." *Wood v. Strickland, supra* at 320. If anything, responsible citizens

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5. It may be suggested that city officials could not have a reasonable belief that they had the right to take the inverse condemnee's property without just compensation. This misses the point. In the typical proceeding, the officials have a good faith belief that what they did did not constitute a "taking" of the plaintiff's property and therefore did not violate his rights. If the suggestion were valid, no official could ever claim qualified immunity. It could always be argued that he must have known he had no right to violate the Constitution regardless of the reasonableness of his belief that his actions did not constitute such a violation.

will be made more likely to seek office, since an official's error will create municipal liability which the citizen will share. It will give citizens an incentive to elect officials who give full and careful thought to the constitutional implications of their actions.

The third justification for qualified official immunity —that it is unfair to force public officials to bear the liability for good faith attempts to obtain lawful benefits for the public—is self-evidently inapplicable to public treasury liability. It is eminently fair that the burdens be born by the same persons who would receive the benefits. Once again, the rationale was stated in *Thayer v. Boston*, 19 Pick. 511, 515 (1837), in which the court said, "if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage . . . ."

B. Municipal Immunity Would Be Inconsistent With the 42nd Congress's Remedial Intent.

Moreover, to give qualified immunity to cities for the good faith actions of their highest officials would defeat the remedial purpose of the Civil Rights Act of 1871—to provide full relief for constitutional harms. The 42nd Congress knew that the scope of the rights of Americans involved close and unresolved questions of constitutional interpretation and it intended to give a remedy for violations of those rights even if they had not yet been articulated by a definite Supreme Court decision. Congressman Dawes explained:

> "I talk of nothing but constitutional guarantees; *I do not claim myself to be able to comprehend their full measure and scope.* As long as the American citizen shall live under this flag and expanding [sic] his

> pursuits in his honest endeavors, so long his constitutional guarantees will expand and grow with him, and be equal to and cover every lawful enterprise and undertaking of his within the limits of this Republic; and *no man can define them upon paper until they come up.*
>
> "*Whatever they be*, he, sir, who invades, trenches upon, or impairs one iota or tittle of the least of them, to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor. That covers, sir, all there is in the first and second sections of this bill." Globe 476. (Emphasis added)

Congress also realized that it would be many years before the Supreme Court issued opinions clarifying many of the rights created by the 13th and 14th Amendments. Senator Thurman said "[I]t will be a long time before the questions that would arise under this section would reach the Supreme Court of the United States and there be definitely settled." Globe App. 216. It is difficult to imagine that the 42nd Congress intended the remedial purposes of section 1 to be so long deferred.

The liberality with which the good faith defense may be applied broadly to immunize local public officials militates against its application to municipal liability, lest the legislative intent be drained of meaning. The reasons for a qualified good faith defense which broadly immunizes local public officials from personal liability are understandable as is the justifiable reluctance of courts to hold public officials personally liable. However, the liberal application of such a broad defense should limit its scope to personal immunity.

The circumstances in the instant case illustrate the argument. Both the trial court (Pet. App. A69) and the

Court of Appeals (Pet. App. A6-7) held the "objective test" of good faith immunized the local officials because they had no duty "to anticipate unforeseeable constitutional developments." On remand, the Court of Appeals interpreted qualified immunity to provide an *extremely broad exemption from liability*. The opinion stated (Pet. App. A6, n. 1):

> "Before Owen's discharge, the Supreme Court appeared to find a liberty interest '[w]here a person's good name, reputation, honor, or integrity [was] at stake because of what the government [was] doing to him,' which when infringed, required the Government to provide the individual with notice and an opportunity to be heard. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). However, not until the *Roth* and *Sindermann* cases did the Court first recognize that a public employee, in the context of being terminated under circumstances imposing a stigma on his professional reputation and impairing his ability to find future employment, was entitled to notice and a name-clearing hearing."

Under that interpretation, it was not sufficient to establish that prior Supreme Court decisions had implied the existence of a right or stated that it existed in a different context. Rather, the court required that the right must have been *expressly* declared by the Supreme Court in the particular context.

What was the state of the law with regard to procedural due process rights of terminated government employees, in April, 1972, when Owen was terminated without a hearing?

Although *Board of Regents v. Roth*, 408 U.S. 564, was decided by this Court on June 29, 1972, two months after the firing, it had been argued in January 18, 1972, and

certiorari had been granted in 1971. The prior decision of the Court of Appeals, *Roth v. Board of Regents*, 446 F.2d 806 (7th Cir.) decided July 1, 1971, stated that "Several Courts have found a due process right where dismissal or non-retention of a public employee jeopardized an interest in practicing a profession, or in preserving a professional reputation." *Id.* at 809, citing *Birnbaum v. Trussell*, (2d Cir. 1966) 371 F.2d 672; *Meredith v. Allen County Hosp. Com'n*, (6th Cir. 1968) 397 F.2d 33; *Lucia v. Dugan*, (D. Mass. 1969) 303 F.Supp. 112; *Orr v. Trinter*, 318 F.Supp. 1041 (S.D. Ohio 1970).

The trial and appellate court decisions prior to 1972 cited above had considered the exact circumstances involved in the instant case, i.e. actions by local governmental officials in the course of the termination of a governmental employee which had the effect of "stigmatizing" him and jeopardizing his professional reputation and opportunities for employment.

The statement of the law in *Roth* merely related the basic constitutional procedural due process right enunciated by *Constantineau* (1971) to the constitutional harm earlier proscribed by this Court in 1946 in *United States v. Lovett*, 328 U.S. 303, 314 (1946). In *Lovett*, petitioners had been discharged from government positions, proscribed from future employment and denied pay by an act of Congress. This Court held that there was a justiciable issue because the act of Congress had "stigmatized [petitioners'] reputation and seriously impaired their chance to earn a living."

In *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1965), this Court said: "'[D]ue process' unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances." It is "compounded of history, reason, the past course of decisions . . ." citing *Joint Anti-Fascist Refugee Committee*

v. McGrath, 341 U.S. 123, 162, 163. Concluding that the particular circumstances of the discharge did not require a hearing, this Court said: "Finally it is to be noted that this is not a case where governmental action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity." (Cites omitted) *Id.* at 898.

If the objective test of good faith, so broadly applied to immunize against personal liability, is transported so as to provide a defense for the municipality itself, the purpose of §1983 will be substantially defeated. If the "good faith" defense immunizes cities it will not serve the public good nor adequately protect individual constitutional rights, the denial of which was to be given a broad remedy by §1983. To the contrary, it would permit local government officials to act without concern either for the potential harm to individuals or the public interest.

C. Recent Decisions Establish That the Considerations Leading to Personal Immunity for Officials Cannot Be Rationally Applied to Create Municipal Immunity.

While events since 1871 cannot inform us as to the intent of the Congress which enacted §1983, is relevant that in recent years courts have considered the question whether transporting the rationales underpinning official immunity to governmental entities would make sense, and have concluded that those reasons do not apply with respect to governmental entities.

This Court recently declared that *Wood's* expressed concern that officers not "exercise their discretion with undue timidity" is not applicable to an award against the public treasury. *Hutto v. Finney*, 436 U.S. 678 (1978). *Hutto* authorized an award of attorneys' fees from a gov-

ernmental entity. The Court criticized the dissenters, who "would apparently leave the officers to pay the award," because the latter result would:

> "def[y] this Court's insistence in a related context that imposing *personal* liability in the absence of bad faith may cause state officers to 'exercise their discretion with undue timidity.' *Wood v. Strickland*, 420 U.S. 308, 321." 436 U.S., at 699, note 32.

Hutto indicates that the Court understands the *Wood* immunity to apply only to "personal" liability, and that the Court does not regard the policy underlying that immunity (preventing "undue timidity" in official decision-making) to be applicable where the award is to come from the entity's treasury.

Hutto's lessons recently have been confirmed by this Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). The plaintiffs owned land in which land use was subject to regulation by the Tahoe Regional Planning Agency (TRPA). Plaintiffs claimed that regulations adopted by TRPA deprived plaintiffs of the economic value of their property without due process or just compensation. Plaintiffs' action under §1983 sought damages from the TRPA and from the individual members of its governing body. This Court held that "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of a state legislator, they are entitled to absolute immunity from federal damage liability." *Id.* at 406. However, the Court noted:

> "If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests. See *Monnell v. Department of Social Service*, 436 U.S. 658." *Id.* at 405, n. 29.

Thus, the Court in *Tahoe* recognized that the concerns which justified the immunity of the TRPA members as individuals did not justify a similar immunity for the entity. Although the TRPA members, as individuals, were held immune from suit under §1983, the Court recognized that an award of damages could be recovered from the TRPA treasury.

In *Kostka v. Hogg,* 560 F.2d 32 (1st Cir. 1977), the Court found the city immune where the facts established only vicarious liability. The Court however commented, "Were we faced with a case in which the municipality had ordered the constitutional violation, the application of the constitutional test could be different." *Id.* at 45.

> "If, on the other hand, the constitutional wrong were the result of a good faith action of a municipal employee, it is not self evident that the overall public interest requires that the municipality always be immune. While the imposition of damages liability on a political subdivision could conceivably result in chilling the performance of some official functions, *the likelihood of substantial inhibition is not great since the officials will not be held personally liable.* In light of the substantial countervailing interest in compensating the victims of unconstitutional conduct, it might well be that, if there were a right of action against governmental bodies, their immunity from damages might be significantly narrower than that of the individual officials." *Id.* at 41. (Emphasis added)

Consideration of possible "corporate" liability is appropriate in any decision-making process, and indeed is essential to assuring that local officials will comport themselves consistently with the federal Constitution. As this Court recognized in an analogous context, *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 417-418 (1975):

> "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices.' "

In *Johnson v. State of California,* 69 Cal.2d 782 (1968), the court considered whether "the danger that public employees will be insufficiently zealous in their official duties" might serve as a basis for entity immunity. Noting that official immunities were developed to protect public employees "from the spectre of extensive *personal* tort liability" (*Id.* at 790) (emphasis added), the court held that it did not "deem an employee's concern over the potential liability of his employer, the governmental unit, a justification for an expansive definition of . . . immune acts." *Id.* at 792. The court "considered it unlikely that the possibility of governmental liability will be a serious deterrent to the fearless exercise of judgment by the employee," but believed that if such deterrence did occur, it might well be "wholesome." *Id.* at 792-93. The *Johnson* decision commented that prior court decisions "hvae criticized legal systems in which the immunity of the public entity corresponds to that of the employee . . ., [because] the reasons for granting immunity to the employee may well differ materially from the reasons for granting immunity to the governmental unit." 69 Cal.2d at 787, n. 3.

Similarly, courts construing the Federal Tort Claims Act have rejected the suggestion that immunity for governmental entities can be justified by the contention that officers will be made unduly timid by the prospect that their actions might result in governmental liability. The prospect of "governmental (as distinguished from personal) liability does not deter governmental employees enough from the vigorous performance of their duties to justify

the loss of a damage remedy for victims of their wrongful acts." *Crain v. Krehbiel,* 442 F.Supp. 202, 216-17 (N.D. Cal. 1978).

Hander v. San Jacinto Junior College, 519 F.2d 273, 277, n. 1 (5th Cir. 1975), declared the "Wood rationale . . . inapplicable to the instant case because the back pay award is entered against San Jacinto College itself and not against the individual members of the Board of Regents."

The Seventh Circuit has gone even further, holding that the public treasury is answerable for compensatory damages (of a legal rather than equitable character) in circumstances where all of the public officials are immune under *Wood v. Strickland* standards. *Hostrop v. Bd. of Jr. College Dist. No. 515,* 523 F.2d 569, 578-579 (7th Cir. 1975).

Similarly, the Fourth Circuit has held that the *Wood* defense is "inapplicable" to a claim for compensatory damages payable from the public treasury, and that proof of "good faith" immunizes the individual officials, but not the public entity, *Bursey v. Weatherford,* 528 F.2d 483, 488-489, and n. 8 (4th Cir. 1975), *rev'd on other grounds,* 429 U.S. 545 (1977). In *Bursey,* the suit was against the public officials in their official capacities, rather than against the entity by name. But as the Fourth Circuit implicitly recognized, and as this Court confirmed in *Monell,* 436 U.S. at 690, n. 55, a judgment against officials in their official capacities runs against the public treasury, not the individual officials.

Thus, modern courts which have considered the factors supporting a good faith immunity for governmental officials have reasoned that those factors do not apply to governmental entities.

We do not ignore the fact that a panel of the 10th Circuit, like the court below, inferred from this Court's ruling in *Monell* that the qualified immunity of local officials in their individual capacities extends to the governmental entity as well. In *Bertot v. School Dist. No. 1, Albany County, Wyoming,* No. 76-1169 (Nov. 15, 1978), *rehearing pending,* a panel of the Tenth Circuit affirmed the trial court judgment reinstating the teacher-plaintiff but on the issue of damages held "Our reading of *Monell* suggests such immunity, short of absolute . . . . Qualified immunity should thus be applied to the board as such and to the individuals in their official capacities." (Slip opinion at pp. 5-6). The opinion does not explore the legislative history of §1983. Judge Breitenstein's dissenting opinion seems well premised on the relevant considerations:

> "For reasons stated in Wood v. Strickland, 420 U.S. 308, 313-322, members of municipal bodies are not monetarily liable in their individual capacities for good-faith actions. No anomaly or inconsistency exists when the same individuals are held liable for the same actions when sued in their official capacities. The distinction is between individual and official responsibility."
>
> * * *
>
> "It may be that Congress should provide some exemption of, or limitation on, liability of a municipal agency. It has not done so. The determination of the relief authorized by §1983 is a judicial responsibility which may not be avoided. As written, §1983 does not recognize the good-faith defense or limit the form or scope of judicial relief.
>
> "A person may not be penalized for the proper exercise of a constitutionally protected right. Perry v. Sindermann, 408 U.S. 593, 598, and Shelton v.

> Tucker, 364 U.S. 479, 485-487. . . . A finding of good faith on the part of the district and its trustees does not preclude recovery of monetary damages." (Slip opinion, dissenting opinion pp. 2-4)

Bertot is now pending before the court en banc (argued May 15, 1979). No decision has been handed down.

The Eighth Circuit in its first ruling in the instant case (Pet. App. at A8-A47) held:

> "Moreover, the primary justification for the defense of good faith in *Wood*, to insure that public officials will not hesitate to discharge their duties out of fear of personal monetary liability, see 420 U.S. at 319-21, does not exist where the city itself will bear the monetary award." *Id.* at A39.
>
> "[W]e hold the good faith defense unavailable as a matter of law in cases involving claims for backpay and similar equitable remedies which will be borne by a unit of government and not individual office holders." *Id.* at A41.

The panel in its second opinion reaffirms that "In our prior opinion . . . we rejected its [the good faith defense] use in an action where back pay is an element of the equitable relief sought, as in the instant case." *Id.* at A5-A6. However, the panel then concluded that such a distinction was undermined by *Monell*, holding (incorrectly we submit) that "the immunity discussion in *Monell* suggests that a limited immunity defense will apply to claims for equitable relief against municipalities." *Id.* at A6. The opinion on remand did not discuss the legislative history of §1983 nor express any rationale for revising its prior opinion that the individual immunity doctrine of *Wood* does not apply to the municipality itself. It gave no explanation for denying recovery under its prior decision *except* its erroneous statement that *Monell* suggests such

limited immunity defense for municipalities. As we have discussed (Part I, *supra*), *Monell* neither decided nor suggested that a municipality as such has a good faith defense to a §1983 case.

It is our strong conviction that the good faith defense of individual officials has no relevance to municipalities. The scope of municipal liability is left far from absolute by this Court's exclusion of liability under *respondeat superior* and its requirement that the conduct involve official action.

V

Municipalities Have No Immunity From the Award of Equitable Relief, Declaratory Judgments, or Attorneys Fees.

Despite twice finding that plaintiff had been deprived of liberty without due process of law (Pet. App. at A3 and A41), the Court of Appeals refused to grant equitable or declaratory relief or to remand for a determination of attorneys fees.

In refusing to grant equitable relief, the court reversed its previous position that "[t]he good faith of the municipality does not constitute a defense to monetary relief as an element of equitable relief." Pet. App. at A38-A39. It was a drastic departure from previous holdings. E.g., *Strickland v. Inlow*, 485 F.2d 186, 190 (8th Cir. 1973) ("Good faith is a defense in damage actions, but not in actions for equitable relief."), *position on immunity sustained sub nom., Wood v. Strickland*, 420 U.S. 308, 314-315 at n. 6 (1975) ("immunity from damages does not ordinarily bar equitable relief as well."). The denial of equitable relief on the basis of the good faith of defendants flies in the face of inumerable decisions of this court granting equitable relief under §1983 without any indication that

the defendants had acted in bad faith. E.g., *Cleveland Board of Education v. La Fleur,* 414 U.S. 632, 638 (1974) (affirming backpay award as "appropriate relief"—see 326 F.Supp. 1159, 1161 (E.D. Va. 1971)); *Vlandis v. Kline,* 412 U.S. 441, 444-445, 454 (1973) (ordering reimbursement of tuition collected in violation of constitutional rights).

Restitution in the form of back pay (or its lesser monetary equivalent)[6] has consistently been held to be an incident to equitable relief. *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 301 U.S. 1, 47-48 (1937). It is "not comparable to damages in a common law action . . . ." *Harmon v. May Broadcasting Co.,* 583 F.2d 410, 411 (8th Cir. 1978) (citing cases).

Section 1983 specifically provides for a "suit in equity." In enacting that language, the 42nd Congress must have been aware that, unless it gave a clear indication to the contrary, §1983 would authorize the full panoply of equitable remedies. As early as 1836, this court had declared "The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction." *Brown v. Swann,* 10 Pet. 497, 503 (1836). In a more recent statement of the rule, the court said, "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Co.,* 328 U.S. 395, 398 (1946); *accord, Mitchell v. DeMario Jewelry,* 361 U.S. 288, 291-292 (1960) ("When Congress entrusts to an equity

6. In its original opinion, the Court of Appeals, rather than ordering back pay as such, ordered a lesser equitable equivalent "measured by the amount of money [plaintiff] likely would have earned to retirement if he had not been deprived of his good name by the action of the City, subject to mitigation . . . ." Pet. App. at 38. This relief was not the equivalent of common law damages since it included no compensation for such non-work-related losses as damage to social reputation, emotional distress, and loss of standing in the community.

court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.")

Sustaining a holding that "good faith" bars equitable relief as well as damages would effectively eliminate incentives to test the constitutionality of any governmental action not previously declared unconstitutional. If coupled with a holding that "good faith" bars declaratory relief as well, it would reduce most pioneering constitutional litigation to an impermissible request for an advisory opinion.

The Court of Appeals' refusal to order the entry of a declaratory judgment that plaintiff's rights were violated —a judgment fully supported by the court's conclusion in each of its opinions that they had been—is inexplicable. Plaintiff knows of no basis or authority for the proposition that immunity bars declaratory relief. *Cf., Carey v. Piphus,* 435 U.S. 247, 252 (1978). In a case such as this, in which plaintiff's good name, reputation and honor are at stake, a declaratory judgment is important for its own sake. Moreover, it would permit plaintiff to recover his attorneys fees under the Civil Rights Attorneys' Fees Awards Act of 1976 (codified at 42 U.S.C. §1988) and this Court's decision in *Hutto v. Finney,* 437 U.S. 678 (1978).

CONCLUSION

We conclude that cities had no "good faith" defense under the common law; that the 42nd Congress would not have created such a defense without doing so expressly, and that the objective of the Civil Rights Act of 1871 to broadly protect individual constitutional rights does not permit an inferential conclusion to the contrary.

Our conclusions are buttressed by the policy arguments against providing cities with the "good faith" defense afforded local governmental officials.

We again point out that under *Monell* which denies municipal liability in *respondeat superior* situations and which requires that city liability be premised on "official policy" the scope of the liability of cities under §1983 is far from absolute.

We, therefore, conclude that the qualified immunity available to local officials in their individual capacities should not be extended to immunize local governmental bodies; and that petitioner should be granted an equitable award in lieu of back pay, a declaratory judgment that his discharge from employment deprived him of constitutionally protected liberty without due process of law, and an allowance of reasonable attorney fees.

We respectfully submit that the opinion of the Eighth Circuit on remand should be reversed and the cause remanded for appropriate relief.

Respectfully submitted,

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FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1779

GEORGE D. OWEN,
Petitioner,

vs.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. When should local government bodies be afforded some form of official immunity similar to the qualified good faith immunity available to local officials in their official capacities under *Scheuer v. Rhodes* and in their individual capacities under *Wood v. Strickland*?

2. When can qualified good faith immunity render inappropriate the award of equitable relief, declaratory judgment, or attorneys fees?

STATUTORY PROVISIONS INVOLVED

In this section of his brief, plaintiff does not set forth verbatim, or refer to, any policy statement, ordinance, regulation or decision officially adopted and promulgated by the officers of the City of Independence, Missouri allegedly pertinent to the questions presented as required by Supreme Court Rule 40(1)(c).

Provisions of the Charter of the City of Independence, Missouri involved are, in pertinent part:

> "Section 2.11. Council not to interfere in appointments and removals. Neither the Council, the Mayor, nor any of its other members may direct the appointment of any person to, or his removal from, office or employment by the City Manager or by any other authority, or, except as provided in this charter, participate in any manner in the appointment or removal of officers and employees of the city. * * *
>
> Section 3.28. Personnel Board: Powers and Duties. The Personnel Board shall * * * (h)ear appeals of officers and employees in the *classified* service who have been * * * removed * * * and report its findings and recommendations in writing * * * to the city manager * * * (who) shall then make (the) final decision * * * regarding the appellant's * * * removal."

STATEMENT[1]

As recognized by the Court of Appeals, the District Court's findings of fact most accurately provide the background needed for understanding the issues presented in this case. These findings may be found in the appendix to the petition for certiorari at pages A47 through A60.

The Discharge

For a substantial period of time prior to March of 1972, plaintiff Owen as police chief (serving in the unclassified service) and defendant Alberg, as city manager, had sharp disagreements over plaintiff's administration of the police department, including his supervision of the property room (Pet. App. A49). In early March, 1972, a handgun which should have been destroyed (according to the property room records) was discovered in the hands of a felon. At that time the City Manager initiated an investigation of the property room. Statements were taken and reports made by the City Auditor and the City Counselor. The City Auditor reported that record keeping in the property room was too inefficient to make an adequate audit of the property therein. The City Counselor delivered the investigative reports to the City Manager and reported in writing to him that there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room (Pet. App. A50).

On April 10, 1972, the City Manager requested plaintiff to resign and accept another position in the police depart-

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1. Throughout this brief, "Pet. App. at ....." shall refer to the Appendix to the Petition for Certiorari, "App. at ....." shall refer to the Joint Appendix, and "Tr....." shall refer to the transcript of testimony.

ment. On April 11 the City Manager again fully advised plaintiff that he would be discharged if he did not resign and accept the other position. In an informal hearing, plaintiff was informed that the City Manager was dissatisfied with his administration of the police department, including his lack of supervision over the records section; the state of those records; and plaintiff's inadequate administration and lack of control of the property room which had resulted in the reappearance of supposedly destroyed property in the hands of other people (Pet. App. A51).

On April 13, the City Manager obtained the consent of another police officer to serve as police chief. On April 18, the City Manager implemented his discharge decision by completing the necessary paperwork towards discharge.

On April 15, 1972, three days prior to Alberg's implementation of his discharge decision, Owen requested that Alberg provide him with written notice of the reasons for the termination and a hearing to appeal the discharge (App. at 18-19). On April 26, 1972, after the discharge, plaintiff's attorneys requested "that the attempted action by the City Manager to terminate the term of office of Chief George Owen be certified to the proper board as an appeal from such action." (App. at 26).

These requests were denied, however, because, beyond present dispute, plaintiff had no property interest in his position. All existing rules, case law and regulations available for review by the City Manager indicated that no other procedural protections could be afforded plaintiff, as an unclassified employee than those he had actually enjoyed. A staff of lawyers assured the named defendants that this was the case (Tr. 242, 165, 167); and, at the City Manager's request, directed a letter to plaintiff's attorneys advising them "that there is no appellate procedure

or form provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen." (App. at 27; and, see Section 3.28 above in Statutory Provisions Involved).

At no time did plaintiff or his attorneys request a name clearing hearing and only informal hearings before the City Manager were given Owen.[2]

The Roberts Statement

Contemporaneously, but without any causal or policy connection whatsoever to the City Manager's acts, a lame duck city councilman, Roberts, unilaterally (Pet. App. at A52) decided that the audit and investigation of the property room should be made public and secretly drafted a statement to be made by him at the City Council meeting on the evening of April 17, 1972. The statement appears *passim* throughout the plaintiff's petition for certiorari and selective references from it appear in plaintiff's statement of the case.

Predictably, both the discharge and the Roberts statement obtained considerable media coverage. Plaintiff (Brief at p. 4) has referred to various articles printed in area newspapers which were admitted conditionally at trial.[3] The City Manager never made any stigmatizing allegations about plaintiff Owen and no statements were placed in Owen's official record which could possibly stigmatize him. A copy of the Council motion, infra, and the

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2. Indeed, although the lack of such a hearing is apparently the constitutional tort plaintiff complains of here, plaintiff has never made a specific allegation in his complaint, or other request, for such a hearing.

3. Defendants objected to these articles because they contained hearsay and were incompetent to show any state action (Tr. 25).

vote on the motion became a part of the City's permanent records as journal entries of the Council meeting (App. at 20-23); however, a copy of the Roberts' statement was not placed in the City's permanent records, and, in any event, the City has had no request for records or other inquiries about Owen from prospective employers (Tr. 81-82; and, 229).

The City Manager did not subscribe to Roberts' accusations and publicly stated before and after the discharge, as did the City Counselor, that there was no indication of any criminal wrongdoing or violation of law by plaintiff (Pet. App. at A14 and A51; Tr. 147; Tr. 224; Def. Ex. 11; Def. Ex. 14). Likewise, the discharge was not based upon Roberts' stigmatizing statement and nothing in the discharge process itself cast a stigma upon Owen (Pet. App. at A37, A44, and A56).

The Council Motion

During a regular Council meeting, the City Council for the City of Independence voted to refer "reports concerning police department inefficiencies" (Pet. App. at A4; App. at 20-23) to the prosecuting attorney for presentation to the next grand jury all in accordance with the requisites of Section 540.020 and Section 540.140 Mo. Rev. Stat. which allow the grand jury to "make careful inquiry into the failure of municipal officers to do their duty" and their power "to investigate and return indictments for all grades of crimes." The City Manager subsequently complied with this Council motion; and, the grand jury then returned a "no true bill". Since that time, no further investigation of Owen's administration of the police department has occurred (Pet. App. at A56).

The Litigation

Owen brought lawsuits in state and federal court based upon Roberts' defamatory statement and the "contemporaneous" discharge (Pet. App. at A32). Plaintiff's state and federal cases both asked for the same lost income as special damages for the discharge and both asked for the same general damages by reason of the defamation (Def. Ex. 27; Def. Ex. 28; App. at 9-11; Pet. App. at A36-38). Roberts has never been a party in this federal action either in his individual or official capacity. Plaintiff's action in the Missouri courts was against both Roberts and the City Manager Alberg.[4]

On June 25, 1976, the District Court entered judgment for the defendants. The holdings of the trial court found that plaintiff had not been deprived of an interest in liberty without due process for three reasons. First, the only reason for plaintiff's discharge did not impute any illegal, immoral, or other stigmatizing conduct to plaintiff. Second, the statement of Roberts had no causal or other substantial connection to the termination of plaintiff's employment. The decisions and reasons for discharge preceded the Roberts statement and Roberts, as a councilman, was prohibited from participation in the City Manager's plenary authority in personnel matters. (Section 2-11 Statutory Provisions Involved, supra). Third, plaintiff was completely exonerated from any charges of illegal or immoral conduct by public statements of both the City Manager and City Counselor and by the grand jury's return of a no true bill. The District Court further concluded that even if plaintiff could have been held to have estab-

4. Owen eventually dismissed the City Manager from the state case (along with allegations of a conspiracy between the City Manager and Roberts) and, subsequently, obtained a financial settlement against Roberts for the Roberts statement on his state petition for libel, slander and malicious prosecution.

lished the threshold question of a deprivation of liberty without due process, the defendants established the existence of a "good faith" defense. The trial court further held that, because of their legislative functions, the immunity of city council members may be even broader than that accorded by the "good faith" defense (Pet. App. A65-A67; A68-A71; and A78).

On appeal, the United States Court of Appeals for the Eighth Circuit reversed and remanded on the issue of damages. Plaintiff's most recent statement of the case in his brief contains selective references from the Court of Appeals discussion of how their conclusions of law differed from those of the trial court (Pet. Brief at 3-6). The most critical difference of opinion lay in the majority's view of the Roberts defamation as the "fact of prime importance," not the fact that the discharge itself was based upon reasons which "did not relate to Owen's honesty or integrity" (Pet. App. A31-32; A37). The majority was primarily concerned about the appearances "in the eyes of the public" regarding the discharge, the Roberts statement, and the Council motions—where "the fact of the discharge, the Roberts statement, and the Council action received great publicity, and the newspapers linked the discharge to the investigation." (Pet. App. A31). Thus, the majority felt that the Council "appeared to lend support to the Roberts charges by resolving that the investigative reports be referred to the County Prosecutor for presentation to the grand jury." The crux of the appellate court's disagreement with the trial court (and with the dissenting opinion at Pet. App. A41-A45) may be found in the following holdings of the majority:

> "The fact of the actual stigma to Owen connected with his discharge is undeniable, for the action of the City of Independence as employer[5] served to blacken Owen's name and reputation. That the stigmatizing charges did not come from the City Manager and were not included in the discharge notice is immaterial, because the official actions of the City Council released charges against Owen contemporaneous and, in the eyes of the public, connected with that discharge. It is the fact of the City's public accusation which is of prime importance, not which official made the accusation." (Pet. App. A31-A32)

The majority's opinion (Pet. App. A8-A45) was vacated on June 26, 1978, by this Court (Pet. App. at A79) and remanded for further consideration in light of *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

The remand opinion of the appellate court readopted the above quoted holdings (Pet. App. at A3-A4); but, held "in the particular circumstances of this civil rights action" that the City of Independence was entitled to qualified immunity from liability (Pet. App. A4-7)—thus, modifying its prior opinion (Pet. App. A38-41).

Both the original opinion and the remand opinion were panel opinions with Senior Circuit Judge Van Oosterhout concurring in the result on remand but adhering to his views as expressed in his dissenting opinion in the former appeal (Pet. App. A41-45).

On remand, the Court of Appeals affirmed the judgment of the District Court, denying plaintiff any relief against the defendants in this case.

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5. We must assume that the court meant "employer (of Roberts)" since Roberts alone made the defamatory statement.

SUMMARY OF ARGUMENT

1. Under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), a local government body can be liable only where its official policy is responsible for a deprivation of rights; and, policy can only be made in two ways: first, where it is "officially adopted and promulgated by that body's officers"; and, second, through practices where policy comes into existence by reason of persistent, widespread, permanent, well settled, deeply imbedded, or traditional "customs or usages with the force of law".

2. However, "a municipality cannot be held liable *solely* because it employs a tort-feasor—or, in other words, a municipality cannot be held liable under Section 1983 on a *respondeat superior* theory." Thus, when policy itself is not at issue in a case or the policy itself is valid, the unconstitutional conduct of a municipality's employees cannot be imputed to its employer.

3. Accordingly, after *Monell*, distinctions must be drawn between conduct and the policy itself—between a "conduct case" and a "policy case".

4. A plaintiff's prima facie case will involve different elements in a conduct case than in a policy case. In a conduct case, a plaintiff must show state of mind (as a basis of liability), duty, proximate cause, and cause in fact. Generally, state of mind proofs will require a showing of intent, or extremely gross negligence (although it would appear that the nature of the constitutional right itself is relevant as to the degree of culpability which must be shown). In a policy case involving a rule of general applicability and future effect, state of mind as a basis of liability is largely inapplicable. In a policy

case the plaintiff has a heavy burden of proof of showing beyond a reasonable doubt that the policy is without any rational basis and that its constitutionality is not fairly debatable.

5. Just as a plaintiff's prima facie case differs in policy and conduct cases, likewise, the entity's defenses in policy cases and the individual's defenses in conduct cases differ. In a policy case, the entity, without the necessity of pleading an affirmative defense, might argue on facts other than those present in its own case, to show that some rational basis for the policy exists. In a conduct case, the defendant bears a burden of proof involving both an objective and subjective test of good faith. The subjective test requires that the defendant show that he acted without malice. The objective test requires a showing that he did not act in disregard of settled, indisputable law and that, otherwise, he also had reasonable grounds for his action.

6. The individual's defenses in conduct cases should also exist as a defense for the entity itself if and when the entity can be held liable, under any circumstances, for the conduct of its employees. Similarly, if an employee can be sued in a policy case, the plaintiff should still bear the burden of proof stated above to overcome the deference to such a policy demanded by the separation of powers doctrine. A strong presumption of validity should always attend true policy.

7. An individual's qualified good faith immunity in conduct cases is a defense on the merits that defeats liability for any relief against any defendant, either in equity or law. This is true because the plaintiff's cause of action in a conduct case involves tort concepts requiring proof of state of mind, duty, proximate cause, and cause in

fact; and, defendant's good faith defense is a complete defense on plaintiff's prima facie case in these regards. The objective part of the defense bears on a plaintiff's proofs concerning duty, proximate cause, and cause in fact whereas the subjective test bears on state of mind.

8. The case at hand was pleaded and proved as a conduct case against all defendants, including the City of Independence. All defendants, including the City, pleaded and proved a conduct defense on the merits, alleging qualified good faith immunity. Assuming that the Eighth Circuit Court of Appeals was correct in its finding that the City, as an entity, could be held liable for the conduct of its high ranking employees, the court correctly allowed the City to defend on the merits of plaintiff's prima facie case in that regard.

9. If and when local government bodies may fairly be said to be liable for the conduct of their public officers and employees, failure to allow a defense on the merits regarding the good faith of such employees would render a municipality strictly liable. The cost of good faith deprivations of constitutional rights should not be internalized to create open-ended liability which would treat the City treasury as a fund for mutual insurance.

ARGUMENT

I.

The Significance of *Monell* in Defining the Considerations Applicable to Decision of the Issues Presented.

Immunity From Suit Abrogated

In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 663 (1978) this Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961) "insofar as it holds that local governments are wholly immune from suit under Section 1983."

Monell's analysis of the legislative history of the Civil Rights Act of 1871 found that *Monroe* incorrectly equated that part of the debates expressing fear that "Congress had no constitutional power to impose any *obligation* upon county and town organizations" with a limitation on "constitutional power * * * to impose *civil liability* on municipalities." *Id.* at 664-665 (court's own emphasis). The Court concluded, therefore, that local governing bodies[6] can be held liable when a plaintiff alleges and proves "that official policy is responsible for a deprivation of rights protected by the constitution." *Id.* at 690.

Thus, under *Monell*, "municipalities are not liable for their acts, even if unconstitutional, but only for their policies." (Amici Brief of American Civil Liberties Union, et al. at p. 8).

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6. The City of Independence is a constitutional charter city organized and operating with home rule powers pursuant to Article VI, Section 19 of the Missouri Constitution; notwithstanding, we do not take issue with the proposition that has been made elsewhere that terms such as "local governing bodies", "cities" and "municipalities" need not be distinguished for purposes of analysis of the issues raised herein from counties, school districts, and so forth.

Since the facts in *Monell* unquestionably involved "official policy as the moving force of the constitutional violation" and since no question was before the Court involving "whether local government bodies should be afforded some form of official immunity," the Court left difficult line drawing problems for another day as to "what the full contours of municipal liability under § 1983 may be." *Id.* at 695 and 701.

The Conduct Case Versus the Policy Case

Monell, on its facts, involves a citywide regulation that compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. The acts (or conduct) of New York's employees were not challenged—therefore the case "clearly involves official policy and does not involve respondeat superior."[7] *Id.* at 701.

The Court carefully stated that a "policy case" such as *Monell* arises only when "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" was involved.[8] *Id.* at 690.

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7. Perhaps recognizing the strained, inconsistent and confusing limitations upon the availability of suit against municipalities under Section 1983 prior to *Monell*, the Court declined the opportunity to explore the wisdom of *Monroe* and other pre-*Monell* Supreme Court cases in order to decide whether or not such cases were correct on their facts when the principles of *Monell* were taken into consideration. These prior cases insofar as they discussed municipal liability, could not possibly have involved the same concepts of official policy and *respondeat superior* as in post-*Monell* cases. For similar reasons, we suggest that plaintiff's extensive reliance on earlier opinions of the lower courts (Pet. Brief at pp. 28-30 and pp. 33-35) misses the monumental importance of *Monell* where that case distinguishes, as we shall see, between a "policy case" and a "conduct case".

8. One other way, and one other way only, that a "policy case" can come into existence, under *Monell*, is through practices which were so persistent, widespread, permanent, well settled, deeply imbedded, or traditional as to rise to the level of a "custom or usage with the force of law". This type of "policy

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Thus, *Monell* requires in all future cases that distinctions be drawn between conduct, or the acts of the public officers and employees of a municipality, and policy itself.

Monell repeatedly underscores that "a municipality cannot be held liable *solely* because it employs a tort-feasor" —or, in other words, a municipality cannot be held liable under Section 1983 on a *respondeat superior* theory. *Id.* at 691. When the policy itself is not at issue in a case (or the policy itself is valid) the unconstitutional conduct of a municipality's employee cannot be imputed to his employer. A cause of action against the employee can, of course, still be stated in what we will term a "conduct case".

In administrative law, a distinction has long been drawn between rule making, the rule itself, and adjudication.[9] For conceptual purposes, it is helpful to analyze *Monell's* treatment of the distinction between conduct and policy in a similar fashion. *Monell* implies that there may

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Footnote Continued—
case" is not present on the facts of this case. However, we note in passing the importance of deciding, in other cases, whether "custom or usage with the force of law" is involved or mere usage. The former is treated with the same deference as public law whereas "usage" (though occasionally used interchangeably with the term "custom") when it is deemed not to have the "force of law" has been viewed as mere conduct or "repetition of acts". Thus, as we shall develop later, mere "usage" may, in some instances, be treated as a "conduct case". Compare *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970); *Nashville, C. & St.L. Railway v. Browning*, 310 U.S. 362, 369 (1940); and, see *Reimer v. Bunbury*, 30 Mich. 201, 214 (1874) (noting that the Constitution is conservatory rather than reformatory and that review of customs previously in use, regarded as necessary in government and sanctioned by usage, must be accorded deference).

9. We do not suggest that this case should have been brought under 5 U.S.C. §501 et seq. The detailed requirements of the Administrative Procedure Act cannot be imported into a constitutional case. Indeed, the federal Administrative Procedure Act is inapplicable to local government bodies.

be "policy making", the "policy itself", and "policy execution".[10]

In general terms, "policy making" should refer to the *conduct* of any officer or employee, regardless of rank, participating in the local government body's processes and practices for adopting, promulgating, formulating, amending, or repealing a policy.

"Policy itself" should mean the whole or part of any statement, ordinance, regulation or other *policy* decision of general applicability and future effect. "Custom or usage with force of law" aside, the policies one will most likely encounter in municipalities are its charter, ordinances, by-laws, and other policy decisions from any officer or employee intended for more than ad hoc application on a particular set of facts.[11]

"Policy execution" should relate to the *conduct* of any officer or employee, regardless of rank, participating in actions which (applying the policy itself to a particular person, acting in the absence of policy, or in violation

10. We do not imply that distinctions, on a case by case basis, will always be readily apparent. For example, in footnote 8, our discussion of usage suggests a potentially difficult situation in distinguishing policy from conduct.

11. This raises questions of whether policy can be made by persons other than the municipality's "lawmakers". A low ranking employee's edicts or acts may conceivably be said to represent official policy if there has been a delegation of autority to make policy ("you decide what disciplinary procedures to use") and a low ranking employee officially adopts a policy within the scope of that delegation (a memo sent around his division or department saying "there shall be no formal or informal hearings prior to disciplinary action in the Street Maintenance Division"). But see Restatement, Second, Agency at p. 2 as discussed in footnote 13, infra.

On the other hand the official conduct of a municipalities' highest ranking officers does not become policy merely because of rank (for example, an incumbent city council could adopt a resolution adjudicating that their opponents in a forthcoming election were guilty of illegal activities). *Id.* at 694.

of policy) results in an order, sanction, or other final disposition (whether affirmative, negative, injunctive, or declaratory in form) which allegedly deprived such person of a constitutional right.[12]

The policy case and the conduct case (for either policy execution or policy making conduct), then, must be viewed as sitting at two different poles. The entity (or its officers sued in their official capacity) should be solely liable where the policy itself is unconstitutional, but no wrongful conduct in making or executing the policy is involved. Individual officers and employees (sued in their individual capacities) should normally[13] be solely liable,

12. Commentators and cases alike, prior to *Monell*, had little need to draw such distinctions between conduct and policy by reason of the holdings in *Monroe* concerning immunity from suit. However, a few articles appeared which tended to recognize these classifications: Chayes, The Role of the Judge In Public Law Litigation, 89 Harv. L.Rev. 1281 (1976); Developments—Section 1983, 90 Harv. L.Rev. 1133, 1227 (1977); and, particularly, the law review article referred to Justice Powell's concurring opinion in *Monell*, Levin, The Section 1983 Municipal Immunity Doctrine, 65 Geo. L.J. 1483 (1977). Likewise, sometimes cases were treated differently if they involved policy, versus conduct. For example, in *Craig v. Boren*, 429 U.S. 190, 204 (1976) the court correctly analyzed the case in terms of issues involving deference and scope of judicial review instead of in constitutional tort terms. However, neither these commentators nor cases had benefit of *Monell;* and, accordingly, they sometimes treated conduct as policy itself, and vice versa.

13. Situations may conceivably be encountered where the individual is not solely liable. In certain cases not involving policy as we have defined it (and usually not involving Section 1983) an individual or group of individuals by their *conduct* can, effectively, bind the City.

The most obvious example would be a Council authorization to the City Manager to enter into a contract on behalf of the City. In such case, if the contract was properly entered into, individual, or collective, conduct of officers and employees breaching that contract might bind the City. This is not to say, however, that traditional agency principles can be applied directly to the activities of governmental officials. Indeed, the Restatement of Agency, 2d Ed. states in its Scope Note at p. 2 that the principles contained therein are not necessarily applicable to public entities.

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on the other hand, where the policy itself is constitutional but either policy execution or policy making conduct is not.[14] This simple declaration drawn from *Monell* (that

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Footnote continued—

A variety of statutory provisions not involved in this case may expressly provide for entity liability for the conduct of officers and employees.

In some instances indemnification laws exist which require municipalities to pay judgments entered against their public officers. In sum, our analysis of liability in the conduct case versus the policy case is tendered not for the purpose of saying that the individual and the individual alone, will invariably be liable for his misconduct but for the purpose of distinguishing between liability rules that should apply in conduct cases versus policy cases.

14. Because verbalizing liability combinations in this regard is difficult, we feel constrained to footnote a model which has been helpful to us in keeping the liability combinations suggested by *Monell* more readily apparent for purposes of analysis:

I (Pure Conduct Case)	II
Policy making-unconstitutional	Policy making-unconstitutional
Policy itself-constitutional	Policy itself-constitutional
Policy execution-unconstitutional	Policy execution-constitutional
III	**IV**
Policy making-constitutional	Policy making-constitutional
Policy itself-constitutional	Policy itself-constitutional
Policy execution-unconstitutional	Policy execution-constitutional
V	**VI**
Policy making-unconstitutional	Policy making-constitutional
Policy itself-unconstitutional	Policy itself-unconstitutional
Policy execution-unconstitutional	Policy execution-unconstitutional
VII	**VIII (Pure Policy Case)**
Policy making-unconstitutional	Policy making-constitutional
Policy itself-unconstitutional	Policy itself-unconstitutional
Policy execution-constitutional	Policy execution-constitutional

We do not think that it would serve any useful purpose to compare each of these models to a previously decided case. The opinions in Section 1983 cases do not often discuss the distinction between policy and conduct—again, they had little occasion to do so before *Monell*. We merely suggest that, for conceptual purposes, there clearly can be policy making, policy, and policy execution—with each being quite independent of the other and capable of examination, standing alone, as to its constitutionality. *Monell* is illustrative. There, prior to this Court's decision in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974),

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the entity is liable for policy and the individual liable for conduct) is of tremendous importance and should serve as the touchstone for clarifying some of the ambiguities present in the law of Section 1983.

The supposed absence of any means under Section 1983 to provide a statutory method of review of unconstitutional local government policies, during the formulative area of Section 1983 jurisprudence after *Monroe*, resulted in the creation of confusing and difficult doctrines which allowed suit against public officials in their individual, and sometimes in their official, capacities but not against the local government body. Both the legislative history and plain meaning of Section 1983 combined with the fact that the suits were against individuals, purportedly for their conduct, oftentimes resulted in treatment of cases which clearly involved policy, as conduct cases. Frequently, a controversy that was clearly between a private person and the government was transmuted into a controversy between two private persons. By the means of this convenient fiction, the courts were able to exert a significant measure of control over cities and to avoid the intolerable result that literal application of the "non-person" doctrine would have created if a citizen was remediless against harsh and illegal policies of his gov-

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Footnote continued—

the conduct of New York's public officers may have been reasonable and not taken with malice or in the face of settled law in the making of the policy in question. Likewise, other New York public officials may have executed the policy in good faith. The policy itself, however, has to stand on its own merits (although policy, unlike conduct, should not be treated as a tort, even a constitutional tort). Taking a similar view, this Court in *Lake Country Estates v. Tahoe Regional Planning Agency*, ... U.S. ....., 59 L.Ed.2d 401 (1979) at fn. 29 suggests that the legislation in that case is, conduct aside, itself subject to judicial review. Compare *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) for the proper scope of judicial review of the T.R.P.A. legislation.

ernment. In many such cases, the local government body was a named party but didn't even bother to raise the absolute immunity afforded it by *Monroe*. However, such cases created confusion when the decisions were forced to move in variant directions simply because attacks on government policy itself had to be viewed in the context of conduct of individual officers.

Cases which clearly involved suits against the officer in his individual capacity to recover damages for the agent's tortious misconduct were dealt with easily. Clear and justifiable immunity defenses were developed in relation to these conduct cases—even where the defendants were sued solely in their official capacities. But where a suit was really against policy itself, and, not an action for damages but for prospective, declaratory or equitable relief, some cases granted relief while other cases, bothered by *Monroe,* did not. The courts sometimes expressed concern that the suit was not really against the individual, but against the municipality; and, the courts were understandably troubled, for reasons of public policy and adherence to precedent, about allowing suit against the government based upon such a fiction. Where a plaintiff sought retroactive, monetary relief where a policy itself caused a deprivation, the courts understandably balked in many cases since it had never been the judiciary's function to stop government in its tracks by making it "a tort for government to govern." *Dalehite v. United States,* 346 U.S. 15, 57 (1953) (dissenting opinion). In general terms, after all, both government and individuals are free to engage in many activities that result in harm to others so long as such activities are not tortious. Traditionally, cities could promulgate a wide variety of laws, regulations and policies—not without fear of challenge, but without fear

of their policy being treated as tortious conduct.[15] Basic policy decisions of government are inherently non-tortious.

Occasional violence has been done to this principle in Section 1983 cases where, as here, the courts have treated conduct as policy. Moreover, great harm is presently threatened if the pre-*Monell* fiction of Section 1983 is continued, after *Monell,* to allow policy cases to be treated as conduct cases—to treat governing as a tort.

Suits involving government policy itself, as opposed to conduct, traditionally require careful and deferential consideration of the policy, its legislative history, its arbitrariness and capriciousness, its character, the interests affected, and a variety of factors not present when a court is asked to review wrongful conduct by isolated acts of governmental officials. Section 1983 has been interpreted against the "background of tort liability." *Monroe* at 187. However, now that we have *Monell's* distinction between policy and conduct we must keep firmly in view that tort concepts always involve conduct and never policy itself.

Henceforth, plaintiffs suing under Section 1983 must be asked to frame their allegations so that causes of action differentiate between the policy case and the conduct case.

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15. It does not follow, however, that the making and executing of such policies will invariably involve non-tortious conduct. It is a simple matter to imagine, for example, that policy makers could fraudulently conspire to pass a policy which, though valid on its face, deprived another person of some constitutional right. Likewise, the execution of valid policy could be unconstitutional (such might be the situation with many police brutality cases).

II.

A Plaintiff's Cause of Action Will Involve Different Factors in a Policy Case Than in a Conduct Case.

The Conduct Case and the Constitutional Tort

The term "constitutional tort" was apparently coined in Shapo, Constitutional Tort: *Monroe v. Pape* and The Frontiers Beyond, 60 Nw. U. L.Rev. 277, 323-24 (1965):

> "It thus appears that what is developing is a kind of 'constitutional tort.' It is not quite a private tort, yet contains tort elements; it is not a 'constitutional law,' but employs a constitutional test. Because of this interesting amalgam, serious questions arise about the measurement of the substantive right. It may well be argued that given the broad language of *Monroe* construing the already broad language of the statute, every policeman's tort and every denial of a license by a state or local board will give rise to an action under Section 1983. The question may be turned around by asking whether it would violate the tenth amendment if Congress passed *Monroe* and its police-tort descendants as a statute."[16]

16. Shapo went on to note that the statute itself, the circumstances surrounding its passage, and logic require application of a standard bearing "an umbilical relation to the statute", which always requires that *"the defendant's conduct be outrageous."* "Harking to the legislative history", Shapo suggested that this standard would call for "a brutality or arbitrariness which goes beyond the garden variety of state tort action." Compare *Baker v. McCollan*, ... U.S. ....., 61 L.Ed.2d 433 (1979) (Blackmun concurring); Developments—Section 1983, 90 Harv. L.Rev. 1133, 1220; and, Note, Limiting Section 1983 Action in the Wake of *Monroe v. Pape*, 82 Harv. L.Rev. 1486 (1969). This standard has, from time to time, been challenged; however, for our purposes here we merely seek to emphasize Shapo's reference to the legislative history which shows that the statute was primarily intended to address misconduct differing from tort only because of a unique type of constitutional injury going beyond the types of injuries recognized in the state's own tort law. If Shapo was right, *Monell* may have extended a statute which was intended to relate to outrageous conduct, to policy itself.

Thus, in conduct cases brought as "constitutional torts" under Section 1983, a plaintiff's prima facie case has traditionally involved allegations and proof pertaining to basis of liability (state of mind), duty, proximate cause, cause in fact, and actual damages.[17] For our purposes here, we do not seek to fully develop the intricacies of pleading and proof in all "conduct cases"; however, we do suggest that the development of those intracacies by others shows a firm requirement of full proof of these elements in plaintiff's prima facie case—with special emphasis on state of mind. If a plaintiff fails to carry his burden of proof in these regards, he should not have the right to *any* relief, legal or equitable, and, he is not the "prevailing party" for purposes of awarding attorney fees. Usually egregious conduct that "shocks the conscience" must be present—either requiring a showing of intent, or extremely culpable negligence, as part of the basis of liability.[18]

17. "Every person who, under color of (law) * * * *subjects, or causes to be subjected*, any * * * person * * * *to the deprivation* of any rights * * * shall be liable to *the party injured in an action at law*, suit in equity, or other proper proceeding for redress." Little would be served here by an extended analysis of the precise relationship of this statute to such tort concepts. Nahmod, Civil Rights and Civil Liberties Litigation (1979) at pages 59-131 admirably serves this purpose. See also Prosser, The Law of Torts, 4th Ed. (1971); and, Nahmod, Section 1983 and the "Background of Tort Liability", 50 Ind. L.J. 5, 7 (1974).

18. Cases such as *Procunier v. Navarette*, 434 U.S. 555 (1978) and *Baker v. McCollan*, ... U.S. ....., 61 L.Ed.2d 433 (1979) have attempted to deal with the question of negligence in Section 1983 actions. One reason "that the question whether an allegation of simple negligence is sufficient to state a cause of action under Section 1983 is more illusive than it appears at first blush" may lie in the fact that conduct cases make it "necessary to establish that the official acted with a degree of intent, or extremely culpable negligence, in bringing about the events that caused the plaintiffs' injury", Note, 89 Harv. L.Rev. 922, 953-54 (1976)—whereas the "degree of culpability" relevant in a policy case can be viewed without reference to tort concepts involving basis of liability. Moreover, since Section 1983 merely floats above a sea of constitutional rights and draws its substance from those rights, the degree of culpability varies in relation to the constitutional right involved.

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While a conduct case will require proof of intent or gross negligence, in a policy case, state of mind as a basis of liability is largely inapplicable. Instead, a plaintiff's cause of action in a policy case will not be drawn from a background of tort liability but from a background of a characteristic feature, and one of the cardinal and fundamental safeguards, of the American constitutional system: what has been called horizontal and vertical separation of powers.

The Policy Case and the Separation of Powers Doctrine

In policy cases deference, federalism and comity are principles arising from the fear of our forefathers that the power existing in every branch and level of government contained the potential for absolute despotism; and, that in constituting a government, there must be a distribution of that power in order to impose checks and balances upon its public functionaries—judge, legislator, and executive alike. It is beyond the permissible scope of this brief to launch into a scholarly analysis of the scope of limited judicial review of local government policies that these principles require. Suffice it to say that the judicial power to declare policies void must be exercised with restraint, that the policy to be reviewed must be identified precisely (to avoid decision on abstract, hypothetical, or moot constitutional questions), that questions of constitutional invalidity must be raised in a plaintiff's first pleadings, that the plaintiff must have a direct and personal interest in the question, that presumptions of validity require construction where possible in favor of constitutionality, and that attacks on policy which merely argue the wisdom, fairness, justice, or expediency of the policy must uniformly fail. Courts will not substitute their judgment for that of another level or coordinate branch of government. In consequence of the general presumption in favor of the validity of the policies of another level and branch of government and the duty of the courts to resolve all doubts in favor of their validity, the rule is fixed that the party who alleges the unconstitutionality of a policy has a heavy burden in sustaining his claim. Unlike the burden of proof in conduct cases which has merely required proof by a preponderance of the evidence, the burden in policy cases requires a plaintiff to show that no rational basis, which might support the policy, exists. Presumptions of validity require proof showing unconstitutionality beyond a reasonable doubt. Certainly, the availability and scope of judicial review will vary depending upon the facts and circumstances of each case. The principle remains the same; and, as pertains to non-statutory review under principles embodied in the constitution (as opposed to procedures mandated by statutes for review of agency decisions) this presumption of validity attends judicial, legislative, and executive policies. *Pacific States Box and*

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Opposing counsel in the case at hand may suggest that basis of liability or state of mind should not receive such emphasis by reason of the statement in *Monroe* that "Section 1983 does not require a specific intent" to deprive a person of a federal right. However, such a statement was accompanied by the further observation that the statute should be "read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187. Specific intent is a phrase most often used in a criminal context where the main distinction between specific intent and general intent is the element of bad or evil purpose which is required for the former. *U.S. v. Haldeman,* 559 F.2d 31, 114 (U.S. App. D.C. 1976). The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction. Out of all of this conversation about motive and intent, a number of courts have developed a "prima facie tort" doctrine, the classic statement of which is: "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse." Prosser, The Law of Torts, 4th Ed., p. 27 (1971).

Basket Co. v. White, 296 U.S. 176, 185 (1935); *United States v. Chemical Foundation,* 272 U.S. 1, 14-15 (1926).

It Is Not a Tort for Government to Govern

Tort concepts drawn from application to private persons do not, in many respects, adequately indicate how tort responsibilities of governmental agencies should be allocated—let alone how checks and balances upon separate branches and levels of government should operate. Public entities typically engage in a wide spectrum of activities through their policies which have no obvious private counterparts. Many governmental functions involve inherent exposure to potentially injurious consequences far in excess of the risks normally encountered in the private sector. Indeed, many of the most typical and routine duties of governmental entities (including the functions embraced by legitimate, cost-free, public takings of liberty and property at the expense of private interests) require the making of policy determinations which invariably involve some injury to individuals. If injury is traceable solely to a policy itself and not misconduct, then government should be given "cost free" notice and opportunity to change that policy, if it is unconstitutional. Government hardly could go on if, to some extent, values incident to property and liberty could not be diminished somewhat without paying for every such change in the general law—through damages for tortious conduct or compensation for inverse condemnation.[19]

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19. In *Fred F. French Investing Co., Inc. v. City of New York,* 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976) the Court held that there could be no action in inverse condemnation for governmental regulations but that the remedy for private interests must be to have the regulation declared invalid as an unreasonable exercise of power. An ordinance would be considered unreasonable where it (A) "encroaches on the exercise of private property rights without substantial relation to

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A Plaintiff Must Bear One Burden of Proof or the Other

The danger of Section 1983, under decisions prior to *Monell,* was that, in some cases, the plaintiff's burden of proof was made more difficult in a conduct case because policy case elements were imported; while in other cases relief was made more readily available in a policy case by reason of the importation of tort concepts. If a local government body is now both capable of being sued and liable in a conduct case (as the majority below held) then the same principles governing what a plaintiff must allege and prove in order to make a prima facie case will apply regardless of whether the defendant is an entity or an individual.

We have seen that in policy cases, where conduct is not involved, the plaintiff has the burden of proof concerning such "objective" and "subjective" factors as legislative intent and rational basis. In a conduct case, the defendant bears the burden of proof as to a subjective test of whether he acted without malice. The objective test requires that he prove that he did not act in disregard of settled, indisputable law and that, otherwise, he also had reasonable grounds for his conduct. *Wood v. Strick-*

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a legitimate governmental purpose," (B) bears no reasonable relation to the ends sought to be achieved, or (C) "renders the property unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value." Many governmental policies have been declared invalid using similar calculus; however, with few exceptions, the courts have refused to view such policies as sounding either in tort or in "temporary inverse condemnation" of property and liberty rights—thereby also refusing to recognize a right to retroactive, compensatory relief.

We would hasten to add that a plaintiff seeking to challenge policy decisions is not forced to await completion of the injury and occurrence of actual damages (as the express language of Section 1983 might seemingly require). Instead, mere threatened injury can provide sufficient standing to challenge an unconstitutional policy. *U.S. v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669 (1973).

land, 420 U.S. 308 (1975); *Scheuer v. Rhodes,* 416 U.S. 232 (1974).[20]

III.

The Qualified Immunity Available to Local Officials in Their Official Capacities Under *Scheuer v. Rhodes* and in Their Individual Capacities Under *Wood v. Strici land* Should Also Exist As a Defense for the Entity Itself if the Entity Can Be Held Liable, Under Any Circumstances, for the Conduct of Such Officials.

Qualified good faith immunity in conduct cases is a *defense on the merits* that should defeat liability for any relief, either in equity or law.[21]

We have seen that the plaintiff's prima facie cause of action in a conduct case involves allegations and proof pertaining to the basis of liability (state of mind), duty, proximate cause, and cause in fact. The good faith defense

20. Absolute immunities, whether legislative, judicial or prosecutorial render certain classes of defendants absolutely immune and hence not proper defendants (or amenable to suit) for damages caused by their conduct. Although the district court recognized the possibility that such absolute immunities may be present in the case at hand (Pet. App. A68) they are not involved in the Questions Presented.

21. We realize that there have been pronouncements, which could be read to the contrary, prior to *Monell.* We respectfully suggest that the logic of *Monell* requires that the qualified good faith immunity defense should properly be viewed as a defense on the merits and not a defense which defeats merely a portion of the relief requested (which comes along *after* plaintiff has prevailed on the merits). Likewise, this qualified immunity defense does not have the attributes of an absolute immunity defense which could serve to defeat a Section 1983 action at the outset. Perhaps for these reasons various commentators have been uncomfortable with the term "qualified immunity". We add that there is no true immunity defense which allows the continuation of an unconstitutional *policy.* (Various formal tests, but also practical determinations as to the relative accessibility to evidence, convenience, desire to place handicaps against a disfavored, but permitted defense, and so on would indicate whether it should be an *affirmative* defense on the merits.)

in a Section 1983 conduct case, when analyzed in its objective and subjective parts, is a complete defense on the merits of such a prima facie case. It disproves the merits of plaintiff's case since the objective part of the defense relates to duty, proximate cause, and cause in fact and the subjective part of the defense relates to state of mind.

Thus, exhaustive analysis of the legislative history of 1983, the common law and policy considerations should not be necessary merely to determine whether a plaintiff has pleaded and proved the elements of his prima facie case. And, if a conduct case is properly pleaded, we should look to see whether plaintiff carried his burden of proof as to *all* defendants, not merely those who were sued in their individual capacities.

In this case, the Eighth Circuit, as we shall see, noted that the conduct of the City's highest ranking employees could "fairly be said to represent official policy" (Pet. App. A3). We need not quibble at this juncture with this conclusion of law; however, it does suggest a rather important point: namely, if the entity, under any theory, can be held liable for the conduct of its employees, regardless of their rank, the Court cannot summarily jettison either elements of plaintiff's prima facie case or elements of a defense on the merits thereof. The entity should be given a conduct defense in a conduct case. Without exception, the decisions since *Monell* have tacitly recognized this fact. *Bertot v. School District No. 1,* Slip Opinion No. 76-1169 (vacated pending rehearing en banc); *Sala v. County of Suffolk,* 604 F.2d 207 (2nd Cir. 1979); *Ohland v. City of Montpelier,* 467 F.Supp. 324 (D.C. Ver. 1979); *Leite v. City of Providence,* 463 F.Supp. 585 (E.D. R.I. 1978); and, *Shuman v. City of Philadelphia,* 470 F.Supp. 449 (E.D. Pa. 1979).

Plaintiff's case on deprivation of liberty, as alleged and proved, related to conduct which occurred on and immediately before April 18, 1972. He complained of an audit and an investigation of the police department which preceded the police chief's discharge. He complained of an adjudication by by the Council that the grand jury should review the 27 voluminous investigation reports upturned by the audit. He complained that the City Manager should have based his discharge upon reasons other than the fact that plaintiff was "terminated under the provisions of Section 3.3(1) of the City Charter" and that he was denied an appeal of the discharge, although he twice requested such an appeal—first, three days before his discharge and second, approximately a week thereafter. (App. 18, 26-27). Most of all, he complained of a lame duck City Councilman's defamatory statement made in the waning moments of that Councilman's last Council meeting.[22]

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22. Opposing counsel would not contend that the defendant City, as an entity, could be sued for the conduct of its municipal court judges (clearly high ranking officials). Nor, would they argue that, although the absolute immunity of the judge from suit would protect the judge as an individual, the City (or the judge sued in his official capacity) could be sued without regard to an absolute immunity defense. By the same token, if in addition to the judge's conduct, unconstitutional official policy caused that conduct or combined with the unconstitutional conduct, then the City could be liable for its policy but not for the conduct of the judge.

A similar analogy is suggested by *Lake Country Estates v. Tahoe Regional Planning Authority*, ... U.S. ..... 59 L.Ed.2d 401 (1979). If Roberts would have, as a legislator, enjoyed absolute immunity for his defamatory statement about another public figure by a mere trick of pleading can plaintiff sue the entity instead of Roberts and avoid the defense? This cannot be the law. Plaintiff must point to some policy that caused the defamatory statement; and, here, far from causing the statement, the City's Charter was constructed to prohibit councilmanic interference with members of the administrative service, including plaintiff. (See Section 2.11, Statutory Provisions Involved, supra).

The obvious First Amendment overtones to this case will merely be noted so as not to make resolution of this case

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In short, plaintiff's complaint alleged that defendants' conduct "*purposefully* subjected plaintiff, a citizen of the United States, to deprivation of rights, privileges and immunities secured to him by the Constitution and laws of the United States" (App. at 9). These allegations were made against all defendants, both the individual defendants sued in their official capacity and the City itself and were denied by all defendants. Plaintiff's proofs related to this alleged misconduct and defenses by all defendants related to this alleged misconduct.

Policy, as opposed to conduct, was discovered by the plaintiff only after the Eighth Circuit's original opinion had been vacated by this court on June 26, 1978 and remanded to the Eighth Circuit for further consideration in light of *Monell*.

Had this case been treated by the lower courts prior to *Monell* as a policy case, we would have seen discussion of the scope of judicial review and of the deference due to such policies. As suggested by Justice Powell in his concurring opinion in *Monell*, we would have looked, not at the silence of policies and customs as they pertain to plaintiff's allegations but "for the affirmative implemen-

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any more complicated than necessary. This case involved as its "fact of prime importance" (Pet. App. A31-32) a statement made by a legislator in a regular session of a Council meeting; and, grave concern about the *public's* right to know about the true facts behind the *appearance* of stigma connected with plaintiff's discharge. Thus, principles of freedom of expression, of free and open debate, of the Speech and Debate clause, and of fair comment and criticism surface which pose issues as to whether the rationale of *New York Times v. Sullivan*, 376 U.S. 254 (1964) requires that the right of public figures to a name clearing hearing be substantially curtailed. For our purposes, we merely suggest that defendants' attorneys and defendants themselves could have (and did, App. 22-23) view this case in the context of *New York Times* (which had already been decided)—and not of *Roth* (which was yet to be decided). Compare *Adams v. Walker*, 492 F.2d 1003, 1009 (7th Cir. 1974) (Stevens concurring).

tation of policies promulgated". *Monell* at 706. We would have looked not at the mere right to control, without any control or direction having been exercised, but at any policy that actually spoke to name clearing hearings. *Id.* at 694.

Moreover, had this been a policy case and not a conduct case, supplemental findings of fact would have been required from time to time in the litigation as successor defendants were substituted to prove that the successor defendants would continue the unconstitutional policies of their predecessors. *Spomer v. Littleton,* 414 U.S. 514 (1974); and, *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605 (1974). In contrast, this conduct case, as a Section 1983 damage action, would not be governed by this requirement since it is retrospective and directed at the 1972 conduct of the defendants' predecessors, particularly Paul Roberts.

IV.

The Legislative History of Section 1983, Common Law and Policy Considerations Support Allowing Local Government Bodies a Qualified Good Faith Immunity in Conduct Cases.

After extensive discussion of the legislative history, the common law, and policy considerations, this court has already recognized the existence of good faith as a defense on the merits. Modern rules of evidence and civil procedure suggest how such a defense must be raised and indicate what evidence will be received thereunder.

We turn to why such legislative history, common law and policy considerations continue to support the existence of the defense of good faith in conduct cases.

Legislative History of Section 1983 Revisited

In *Monell,* this Court carefully reviewed the legislative history of Section 1983 as it pertained to distinctions that must be drawn between the policy case and the conduct case. This Court's discussion of the legislative history as it related to *Monell's* holdings on *respondeat superior* are particularly instructive as are the frequent references to the concepts of "duty" and "obligations" running thru debates on the Sherman Amendment. The Court, citing W. Prosser, Law of Torts, Sec. 69, at 569 (4th Ed. 1971), rejected liability where a city is "blameless"—even if the city as employer had the right to control the actions of a tort-feasor but did not actually exercise such control. *Monell,* at footnote 58, citing *Rizzo v. Goode,* 423 U.S. 362, 370-371 (1976). Such a conclusion was not merely drawn from the legislative history of Section 1983 but also from the language of the statute itself:

> "* * * the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend Section 1983 liability to attach where such causation was absent."

Monell's review of the legislative history of Section 1983 does not suggest that tort concepts are to be applied differently between entity defendants and individual defendants. The legislative history, and the statute itself, do not suggest that, merely because a defendant is an entity, he should be handicapped by a prohibition of any defense on the merits of a plaintiff's prima facie case. Among other principles, federalism should caution against such unlimited liability in the face of broad and changing constitutional doctrine. In *Monroe,* Mr. Justice Frankfurter stated:

> "[R]espect for the principles which the Court has long regarded as critical to the most effective functioning of our federalism should avoid extension of a statute . . . into applications which invite conflict with the administration of local policies. Such an extension makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, or investigator, every clerk in every municipal licensing bureau in this country. The text of the statute, reinforced by its history, precludes such a reading."

365 U.S. 167, 241-42 (1961) (Frankfurter, J., concurring in part and dissenting in part).

The Common Law

As early as 1798, even though the idea of a municipality as a corporate entity was still a nebulous affair, the absolute immunity of the state was extended to cities. *Russell v. Men of Devon,* 2 Term Rep. 667, 100 Eng. Rep. 359 (1798). By 1871 the notorious governmental/proprietary distinction had modified the rule of absolute immunity—an unworkable distinction that caused much confusion and left the law in a tangle of disagreement. Studying common law rules as they existed in 1871 pertaining to municipal immunity leaves one with the realization that such immunity has always been recognized and necessary in some form but that the "rules which courts have sought to establish in solving this problem are as logical as those governing French irregular verbs." *Weeks v. City of Newark,* 162 A.2d 314, affirmed 168 A.2d 11 (1961).

Clearly the immunity of cities in 1871 was qualified—just how it was qualified is an exceedingly difficult question to answer. It is, in fact, a question that does not need answering. All forms of immunities (as opposed

to defenses on the merits) were carried to the several American states from the English crown. Scholars disagree on whether such immunity was based upon the fact that the king could do no wrong or upon the fact that the king was not allowed to do any wrong. One way or the other, the immunities filtered down changing in their form and composition depending upon where they settled.

For example, by 1896 absolute immunity as "a creature of the common law" existed for executives. *Spalding v. Vilas,* 161 U.S. 483 (1896). Such absolute immunity continued to be recognized in *Barr v. Matteo,* 360 U.S. 564 (1959). However, in *Scheuer v. Rhodes,* 416 U.S. 232 (1974), the court refused to accept the firmly established, well recognized absolute immunity at common law, for executives—changing the common law rule to accommodate federal interests and purposes under Section 1983 to create a qualified good faith immunity.

Cases such as *Tenney v. Brandhove,* 341 U.S. 367, 418 (1951) and *Scheuer,* supra, require merely that Section 1983 be read in harmony with general principles of tort immunities and defenses; they do not require that those immunities and defenses be applied in their pure form. The common law itself is not pure in form.

In any event, in the 1870's it was well known that, even in cases where absolute immunity was qualified, municipal liability could not be predicated upon holding "the city, in its corporate capacity" liable for simple negligence in the performance of duties imposed upon it by the legislature. *City of Freeport v. Isbel,* 83 Ill. 440 (1877); and, *Coolidge v. Brookline,* 114 Mass. 592 (1874).

There are many legitimate questions and problems which arise when government is afforded absolute im-

munity. The fiction of suits against the individual results which, as we have seen, creates confusion, and, therefore, inequities in variable application of immunity rules in one case versus another. Abrogation of all immunity, qualified and absolute, would result in more than mere confusion. There are manifestly many legitimate reasons and problems which would arise if local government bodies were held to be without immunity. These problems are the same problems that concerned the courts one hundred years ago and should concern this Court today: Is there to be any such thing as a financial limit upon recoveries against the government, either as to any one claim, or as to multiple claims arising out of any one incident? What can be done about protecting the public against nuisance suits? Is mutual insurance advisable to compensate, out of the city treasury, all constitutional torts? These, and innumerable other questions, have always been dealt with both by court and legislator alike; and cannot be ignored in the case at hand. It is not a tort to govern; however, if governing is to be treated as a tort, government should not be held strictly liable. See Van Alstyne, Governmental Tort Liability: A Public Policy Prospectus, 10 UCLA L.Rev. 463 (1963); Kennedy and Lynch, Some Problems of a Sovereign Without Immunity, 36 So. Cal. L.Rev. 161 (1963).

One final point on the common law. The court in *Scheuer,* at pages 239 and 240 recognized that the concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity—that the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability:

> "This official immunity apparently rested, in its genesis, on two mutually dependent rationales:* (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good."

The Court drew these rationales (and acknowledged in a footnote(*) that it did so) from Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 213, 223-224 (1963).

Since this pronouncement in *Scheuer,* the courts have disagreed as to the applicability of both of these rationales when speaking to immunity of the entity. Jaffe himself, the author of these rationales saw no such distinction and felt that they were both pertinent as to immunity of the individual and immunity of the govenrment. Jaffe's logic treated these rationales as "coterminus" (at. p. 213) as they related to governmental and individual immunity.

We respectfully suggest that so much of the absolute municipal immunity as is left from the common law, as identified in *Scheuer,* should be applied in the case at hand.

Policy Considerations

For reasons which are not altogether apparent to this writer, local government has been singled out for special treatment as to immunity. Absent consent, the federal government continues to have sovereign immunity and state government continues to have Eleventh Amendment immunity. Under plaintiff's theory, even our employees would have some form of official immunity—but if a plain-

tiff sues the City instead of such official, all vestiges of immunity are to disappear. Perhaps this special treatment is due to the fact "that the City, in its corporate capacity" is viewed differently than the City in its governmental capacity. At common law a municipality was regarded as a private corporation, when acting in its proprietary capacity, as related to its liability in tort, McQuillin, the Law of Municipal Corporations, Chapter 53. But the Fourteenth Amendment is applicable to *state* action, not action by a private corporation. Local government is liable for *state* action under Section 1983 but does not enjoy the protection of the states afforded by the Eleventh Amendment. To also hold that our employees have a qualified immunity in conduct cases, but that we do not, is to start losing our immunity protection from the other direction as well. It is to deny us even a defense on the merits.

Any statement that recognizing a good faith defense for municipalities would deter impetus to change unconstitutional policies ascribes more weight to the importance of compensatory relief in this regard than either the statutory construction of Section 1983 or reason support. Compensatory relief in isloated cases would create a double cost for government—in paying for past good faith conduct and also in paying for a change in policy. If a plaintiff cannot recover damage awards against either the individual or the entity where good faith is involved, then good faith decision making would not be deterred. On the other hand, if a plaintiff may recover against an entity for *all* conduct (whether done in good faith or bad) then *all* decision making will be deterred. A public official would think twice before acting along a course other than the tried and true.

Better that funds should be left for the making of good faith policies than to pay for isolated, non-continuing, good faith deprivations through open-ended city liability.

The policy considerations underlying immunity include realization that the responsibilities of government require that public officials be allowed to engage in conduct which might be tortious if done by private parties. Damage awards are an ill conceived proposition to supplement the traditional remedy for attacking governmental policy (through scope of limited review under the separation of powers doctrine). Allowing the entity a good faith defense from surprise liability and damages would not preclude a plaintiff from bringing such traditional challenges to generally applicable policy (and recovering his costs and attorney's fees if successful). Such challenges (as with the desegregation cases alluded to in *Monell* at footnote 2) carry with them the potential for systematic relief against the policy itself instead of isolated, piecemeal damage awards. Such suits allow vindication of public, versus private, interests.

Yet, a citizen is not without a remedy to protect private interests as well. He will continue to have incentive to sue if he has reason to believe that policy was executed or made in bad faith. He would have reason to put public officials expressly on notice that they should change their conduct. He has the opportunity to apprise public officials of settled law (thereby removing the ability of those public officials to argue that they did not know of plaintiff's constitutional rights under the objective part of the *Wood* test). Giving local government bodies a qualified good faith immunity will not likely result in fewer Section 1983 cases being filed; but, it may encourage out of court settlement of disputes.

Indeed, failure to grant qualified good faith immunity to the entity would serve little purpose other than extending an open invitation to possible plaintiffs to bypass suit against the individual himself (whose act caused the injury and who was intended to be the defendant in abuse of power cases). Why would a plaintiff risk suit against the individual and the problems that a good faith defense could pose when he could merely sue the entity and avoid the inconvenience?

Opposing counsel is undoubtedly aware of the spectre posed by their theories: of municipal liability that would pave the way for federal courts to control major policy and budgetary decisions of local government, of vexatious litigation that would cause decision makers to set avoidance of municipal liability above what might otherwise be in the best interests of the public, and of overwhelming money judgments against a city that could literally cause certain government functions in large cities to cease and cause small governments to suffer total bankruptcy. No "special immunity defense" predicated upon saving local government bodies from *total* bankruptcy will suffice.

V.

Retroactive, Monetary Relief May Be Available to Plaintiffs in Conduct Cases When They Are the Prevailing Party; However, Presumptions of Validity Springing From the Separation of Powers Doctrine Render the Question of Retroactive, Monetary Relief in Policy Cases Subject to Resolution of Different Issues Involving Whether or Not the Policy Was Voidable or Void Ab Initio.

A plaintiff who has carried his prima facie cause of action against an individual or governmental defendant in a conduct case may, in accordance with the principles of

Carey v. Piphus, 435 U.S. 247 (1978) receive appropriate relief, including retroactive monetary relief. Although Section 1983 on its face says nothing about remedies, two kinds of actual damages are clearly available: First, special damages consisting of medical expenses, lost income and the like, which are proximately caused by a defendant's conduct; and, second, general damages consisting of pain, suffering, humiliation, embarrassment, emotional distress, and damage to reputation. Punitive damages may be awarded—as can equitable relief, unless there is an adequate remedy at law. *Id.* at 257. As the Second Circuit has stated, "there is no logical reason why general principles of damages should not apply to a civil rights action." *Zarcone v. Perry*, 572 F.2d 52, 55 (2nd Cir. 1978).

By definition, a conduct case will arise from some past occurrence and become actionable, when actual injury occurred. We have seen that in addition to such unconstitutional conduct, some continuing policy may also be unconstitutional. Conceivably in such a case the individual defendant could successfully carry his burden of proving good faith immunity; however, such good faith immunity in the conduct case may not be totally applicable in a policy case against the entity. *Lake Country Estates*, supra, fn. 29. Since no policy is challenged in the case at hand we need not fully explore the complexities of joint and several liability between conduct case and policy case defendants; however, we again point out that it is always a plaintiff's burden to properly draft his complaint in sufficient fashion to put the court on notice as to whether he is challenging the constitutionality of a policy or of conduct (lest the court be led to believe that it may review policy itself as if it were a constitutional tort).

Because we suggest that we are not dealing with a policy case (such as on *Monell's* facts) the problem of

retroactively when a policy is held void ab initio is discussed in the footnote.[23]

We note in passing that the problem of retroactivity in a policy case is not totally dissimilar to the considerations of whether good faith immunity is available. *Cox v. Cook*, 420 U.S. 734, 736 (1975) (per curiam); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978); and, compare *Sala*, supra.

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23. There are three questions involving retroactivity which bear comment. The first is whether the Supreme Court's ruling in *Board of Regents v. Roth*, 408 U.S. 564 (1972) somehow had retroactive application upon defendants' conduct in failing to affirmatively offer plaintiff a name clearing hearing. This is simply the good faith issue and is easily answered in defendants' favor by applying the teachings of *Wood* and *Scheuer*.

The second question is whether *Monell* itself should be given retroactive application as has been done in cases such as *Aiello v. City of Wilmington*, 470 F.Supp. 414 (D.C. Del. 1979). On this issue we read the majority's holding in *Monell* that "municipalities can insert no reliance claim which can support an absolute immunity" as indicative of the fact that the Supreme Court had no intention of making *Monell* operate prospectively—as was done, for example, by the Missouri Supreme Court when it abrogated absolute immunity in *Jones v. State Highway Commission*, 557 S.W.2d 225 (Mo. 1977).

The third question involving retroactivity is not presented in this case (a point which again underscores that this is not a policy case) but is present in *Monell*. This is the issue of whether an ultimate ruling of unconstitutionality as to a policy renders that policy void ab initio, or merely voidable. In other words, in *Monell*, there was a policy of general application and continuing effect compelling pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. The effect of judicial rulings declaring existing policies unconstitutional raises difficult questions which clearly show that no principle of absolute retroactive invalidity is justified. Retroactive, monetary relief is, of course, allowed in some cases (although in the federal context such relief is normally specifically directed by Congress, as in Title VII cases allowing back pay for a period of two years). The plaintiffs in *Monell* (see ACLU brief pp. 2-3) may argue these *Sunburst* issues based on cases such as *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971); *Daniel v. Louisiana*, 420 U.S. 31 (1975); and, *Lee v. Missouri*, 58 L.Ed.2d 736 (1979). Law Review articles such as Rogers, Perspectives on Prospective Overruling, 36 UMKC Law Rev. 35 (1968); and, Mishkin, The Supreme Court, 1964 Term Forward: The High Court, The Great Writ, and The Due Process of Time and Law, 79 Harv. L.Rev. 56 (1965) should also be consulted.

VI.

Denying Equitable and Declaratory Relief and Denying Attorneys Fees to Plaintiff Was Within the Sound Discretion of the Court of Appeals and District Court.

Defense on the Merits, a Bar to Any Relief

Assuming for the moment that the threshold question of whether the plaintiff has been deprived of a right secured by the constitution is met (whether a deprivation of liberty without due process did occur), we are left with the undeniable fact that no pattern of injuries existed; no official policy in the sense of any officially adopted or promulgated regulation, rule or decision of general application and future effect existed; and, nothing, after plaintiff's discharge, continued to have prospective application. Nothing has been placed before this Court or brought to its attention in the section of plaintiff's brief pertaining to Statutory Provisions Involved so that we can see the language, breadth and scope of any challenged policy.

Had plaintiff's cause of action resulted in a declaration that the City's Charter or some other officially adopted policy was unconstitutional in some respect we would have a different case. Here, no such policy is involved. Instead, we are dealing with allegations and proofs about a defamatory statement by a high ranking official—which conduct was automatically imputed to the City itself when the Court of Appeals found that such "conduct amounted to official policy" (Pet. App. A4).

We have suggested that in a conduct case the qualified good faith immunity defense is a defense on the merits. If this is true, defendants' unchallenged success in showing both the objective and subjective parts of its good faith immunity is a complete defense on the elements of plaintiff's prima facie case involving state of mind, duty, proxi-

mate cause, and cause in fact. A bifurcated approach which suggests that a plaintiff can prevail on the merits for equitable purposes but not for retroactive, monetary relief should be rejected.

Back Pay As Measure of Damages

The petitioners in *Monell* rejected treating back pay as equitable, when they conceded, in oral argument, that the distinctions between law and equity have long since been abandoned.

In the case at hand, plaintiff has not treated back pay as a part of any request for a hearing (the denial of which is pointed to as the constitutional tort); and, the Court of Appeals readily acknowledged that plaintiff was discharged "for reasons which apparently did not relate to Owen's honesty or integrity" (Pet. App. A37). At trial plaintiff expressly abandoned his request for reinstatement (Tr 69-70). In short, back pay in this case (if a distinction between law and equity can be drawn) is more clearly a measure of damages than an element of equitable relief. It falls on the wrong side of the legal/equitable line for plaintiff's purposes. That back pay is a remedy at law in this case is buttressed by the fact that the Court of Appeals left it to the discretion of the District Court whether to supplement this measure of damages by receipt of additional evidence "bearing upon Owen's likely earnings to retirement in the absence of his being deprived of his good name" (Pet. App. A38).

The Court's Discretion

It was well within the discretion of the lower courts to deny equitable relief and declaratory judgment since plaintiff established no legitimate claim of entitlement to back pay. Compare *Garcia v. Daniel*, 490 F.2d 290, 292

(7th Cir. 1973); *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 579 (7th Cir. 1975); *Sullivan v. Meade Independent School District No. 101*, 530 F.2d 799, 808 (8th Cir. 1976); *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962).

The discretion of the Court of Appeals exercised in this case in refusing equitable and declaratory relief is consistent with prior decisions of this court—even decisions where a strong presumption in favor of an award of back pay, as a clear statutory right, is involved. For example, in Title VII cases, the presumption of *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) in favor of back pay awards can, in the discretion of the lower courts, be overcome. *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 720 (1978).

Attorneys Fees

Of course, since plaintiff is not the prevailing party, and since the Court of Appeals may have felt, again in its discretion, that special circumstances precluded an award of attorneys fees, it was justified in refusing such an award. *Newman v. Piggy Park Enterprises*, 390 U.S. 400 (1968); and, *Hutto v. Finney*, 437 U.S. 678 (1978).

VII.

Plaintiff Has Failed to Satisfy the Threshold Requirment in This Section 1983 Action of Showing That He Has Been Deprived of Liberty Without Procedural Due Process.

The trial court determined that there was no causal or other substantial connection between plaintiff's discharge by the City Manager and the statements of Roberts at the Council meeting. Citing, *Paul v. Davis*, 424 U.S.

693 (1976), Judge Van Oosterhout in his dissenting opinion (Pet. App. A41-A45) felt that such a determination was supported by substantial evidence and not clearly erroneous: that no violation of plaintiff's liberty rights in connection with his discharge was established by plaintiff. The district court's findings on whether the plaintiff has been deprived of a right "secured by the Constitution and laws" remain as an additional reason for finding that plaintiff had no claim cognizable under Section 1983 (Pet. App. A56-57, A63, A67, and A78).

We do not know what moved the majority below to make the critical ruling that a name clearing hearing should be given when a discharge is connected with defamation "in the eyes of the public". Perhaps they thought that the public had a right to know the truth or falsity of the Roberts charges—involving, as the charges did, an important local issue concerning two of the most public figures a city has, a police chief and a councilman. However, it is the First Amendment, not the Fourteenth which performs the office of keeping the channels of public debate open. In the First Amendment context, if the Roberts defamation was used in a context in which important public figures of divergent political views routinely use uncomplimentary language about one another—a context in which First Amendment interests override a state interest in enforcing its own law of defamation—it would be "most anomalous to conclude that the subject of the robust comment has been deprived of an interest which is at once protected by the Fourteenth Amendment but which the First Amendment prohibits the state and its political subdivisions from protecting". *Adams,* supra, fn. 22. Indeed, the debates on the Sherman Amendment show that it is precisely this lack of power to act that limits a municipalities' Section 1983 liability.

CONCLUSION

Treating the Supreme Court's prior vacating order in this case (Pet. App. at A79) as a decision on the merits, see *Board of Trustees of Keene State College v. Sweeney,* ..... U.S. ....., 58 L.Ed.2d 216 (1978) (Stevens, J., dissenting), the Court of Appeals in light of *Monell* properly recognized the existence of the availability of a qualified good faith immunity defense to the City of Independence on the merits of plaintiff's prima facie case.

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FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1779

GEORGE D. OWEN,
Petitioner,

vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1779

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MISLEADING ASPECTS OF RESPONDENTS' STATEMENT

Several inaccuracies in Respondents' "Statement" require a reply. Respondents' denial that Owen requested a name clearing hearing (Brief for Respondents, p. 5) is impossible to square with the facts of this case. In a letter to the City Manager (P.Ex. 3, App. at 18-19, Tr. 22), plaintiff stated, *inter alia*:

> "I have requested that you afford me a charge and specification of charges in writing and that I be granted a public hearing and a right to be represented by counsel . . . [Y]*our relief and discharge of me without a full public hearing upon written charges will leave in the minds of the public and those who might desire to have my services, a stigma of personal wrongdoing on my part.*" (Emphasis added)

This letter, although dated April 15, was received by the City Manager on April 18, 1972, the day after the meeting of the city council. (Tr. 229) The City Manager decided that there was no basis for a hearing (Tr. 247) and no separate response was made to Exhibit 3. A second request was made by Mr. Owen's former attorney. (D.Ex. 8, App. 26, Tr. 173) Both the District Court and the Court of Appeals found that two requests for hearings had been made and neither court ever suggested that these requests were insufficient. (Pet. App A16-17, Pet. App. A54-56) Owen was denied a hearing by a letter from the city counselor's office and no hearing was offered or given. (Pet. App. at A4, A17, A5)

Respondents' Statement (Brief for Respondents, p. 4) is further misleading when it refers to an "informal hearing" between Owen and the City Manager. A full reading of that reference to the trial court's opinion (Pet. App. at A51) clearly reflects nothing more than a short discussion which had none of the aspects of even an informal "hearing." The total evidence as found by the trial court and evaluated in both the opinions of the Eighth Circuit specifically found that petitioner did not at any time receive *any form* of name clearing hearing. (Pet. App. at A4)

Respondents' Statement (Brief for Respondents, p. 5) is also misleading in its emphasis on the Roberts' statement

and the statement (Brief for Respondents, p. 7) that "Owen brought lawsuits in state and federal courts based on Roberts' defamatory statement . . ." The unconstitutional harm to petitioner was a result of the official actions and decisions of the entire city council and the city manager, the highest officials of the city, not the act of a single councilman.

ARGUMENT

I

Respondents' Discussion of *Monell* Is Not Supported by Reason or Authority

Respondents' discussion of *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) (Brief for Respondents, pp. 13-28) is simply inconsistent with the opinion in that case. In *Monell*, this court stated that a city could not be held liable under §1983 if the sole basis for municipal liability was the fact that it was a city employee who committed the unconstitutional action. However, the court held that the city would be liable if the unconstitutional action "implements or executes a policy statement, ordinance, regulation or decision" of the city. *Id.* at 690. The city would be liable as an entity if "execution of the government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694.

Monell did not limit municipal liability to cases attacking a policy in the abstract. Rather, it specifically stated that municipalities would be liable when the "*action* that is alleged to be unconstitutional implements or executes" official policies or decisions. *Id.* at 690. In order to

have a case or controversy and for a plaintiff to have standing, every §1983 suit necessarily challenges some conduct - either actual or threatened - adversely affecting the plaintiff. An abstract attack on a policy or decision that has not been and will not be enforced does not present a case or controversy.

There is no indication in *Monell* that municipalities will be insulated if their policies or decisions are valid on their face but unconstitutional as applied. Quoting from *Nashville, C. & St. L. R. Co. v. Browning,* 310 U.S. 362, 369 (1940), the court said "Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law then the dead words of the written text." *Id.* at 691 n. 56. Of course, the policy or decision need not be reduced to writing. *Id.* at 691. Moreover, *Monell* permits actions challenging unconstitutional conduct executing or implementing municipal "decisions" (*Id.* at 690) not (as alleged at Brief for Respondents, p. 16) just those implementing a "statement, ordinance, regulation or other policy decision of general applicability and future effect." For example, the court noted that §1983 was intended to provide a remedy for uncompensated takings. *Id.* at 686-687.

Finally, there is nothing in *Monell* indicating that suits against municipalities under §1983 are to be divided into two types having different elements and standards of proof.

In the present case, official policy was similarly the moving force of the constitutional violation suffered by Mr. Owen. Applying the teachings of *Board of Regents v. Roth,* 408 U.S. 564 (1962) the Court of Appeals held the City of Independence liable for its refusal to grant appellant, its employee, a hearing which he sought to clear his name of the stigma imposed in the course of the termination of his employment. In its original opinion the Court said:

> "Accordingly we hold that the action of the City of Independence deprived Owen of liberty without due process of law, in violation of Owen's rights under the Fourteenth Amendment." (Pet. App. at A32).

The denial of a hearing was based upon the City Charter itself. The District Court found that "The Charter [of the City of Independence] did not provide that the Chief of Police was entitled to any notice of reasons, or a hearing, in connection with the termination of his employment." (Pet. App. at A48). This factual finding was not disputed by any party. In its first brief in the Court of Appeals the City stated "Section 2.11 of the Charter would prohibit the council from holding such a [name clearing] hearing." (Original Brief for Appellees/Cross Appellants, at p. 32). In the same brief, the City argued:

> "Indeed, plaintiff's eighth finding of fact *recognizes that the City Charter and Personnel Rules denied plaintiff a right to reasons and a hearing prior to removal from office.*" *Id.* at 26. (Emphasis added)

Accordingly, the conclusion seems inescapable that the denial to petitioner of a hearing was the implementation of the official policy of the City as established by its Charter, certainly within the ambit of a "policy statement, ordinance, regulation or decision 'officially' adopted and promulgated by that body's officers." The "moving force" of the constitutional violation was "official policy" since it was the charter itself upon which the council based the denial of a hearing.

This by itself is sufficient to hold the City responsible under *Monell.* However, the City is also responsible because the stigma was created by acts of "those whose

edicts or acts may fairly be said to represent official policy." In an official city council meeting at which both the press and the public were present, a city councilman read a statement impugning Owen's honesty and integrity. (Pet. App. at A31). As part of the statement, the councilman moved that the results of the investigation be turned over to the prosecutor for presentation to the grand jury and that the city manager take "direct and appropriate action" against those "involved in illegal, wrongful or gross [sic] inefficient activities." (Pet. App. at A54 n. 2). The city council approved the statement and motion, passing the motion by a formal vote of the city council, thereby lending its support to the councilman's charges. (Pet. App. at A16, A31). The following day, the city manager discharged Owen. (Pet. App. at A26). He reinforced the implication of wrongdoing by publicly announcing that he was referring the matter to the prosecutor for submission to the grand jury. (Pet. App. at A3-4 and A31 n. 11).

After reviewing these facts in light of *Monell*, the Court of Appeals on remand specifically held that the City's action in stigmatizing Owen during the course of his discharge and denying him a hearing to clear his name were the implementation of City policy:

> "The city charter of Independence did not entitle the police chief to a name-clearing hearing in connection with his discharge, and Owen was not given one. We conclude that the stigma attached to Owen in connection with his discharge was caused by the official conduct of the City's lawmakers, or by those whose acts may fairly be said to represent official policy. Such conduct amounted to official policy causing the infringement of Owen's constitutional rights, in violation of section 1983." (Pet. App. at A4).

The city declines to "quibble" with this conclusion (Brief for Respondents, p. 29) and gives no reason to reject it.

II

Respondents Give No Reason to Believe That the 42nd Congress Intended to Create a "Good Faith" Immunity for Municipalities Sued Under 42 U.S.C. § 1983

In our previous brief, we concluded that a city official's good faith belief that his actions were lawful did not immunize the municipality from liability under the common or statutory law prior to 1871. (Brief for Petitioner at 14-17) This conclusion was strongly reinforced by the thorough analysis contained in the Brief for National Education Association *et al.* Their research, like ours, did not reveal a single case in which any American court in the Nineteenth Century held that the good faith of municipal officials immunized the municipality itself. Brief for National Education Association *et al.* at 20.

Respondents make no claim that any such cases existed and do not assert that the common law recognized good faith immunity for municipalities. *Coolidge v. Brookline*, 114 Mass. 592 (1874), cited by Respondents at page 35, has nothing to do with municipal liability but simply held that the City of Brookline was not authorized to raise money to finance a lobbying campaign to block annexation by Boston. *City of Freeport v. Isbell*, 83 Ill. 440 (1877) simply held that, since the legislature had given the city the option of lighting or not lighting its streets, its failure to light them could not be common law negligence.

Respondents' citation (at page 29) of *Shuman v. City of Philadelphia*, 470 F.Supp. 449 (E.D. Pa. 1979) is surprising since that case supports Owen's position—not Respon-

dents'. *Shuman* held that the good faith of city officials did *not* immunize the city from liability for damages or equitable relief. The Court said:

> "We conclude that in a case such as this, where a policy of a municipality is under attack, the doctrine of good faith immunity is not applicable. . . . Alternatively, we conclude that any immunity which might be applied would not bar equitable relief." *Id.* at 464.

The reliance of Respondents on the panel decision in *Bertot v. School District No. 1,* Slip Opinion No. 76-1169 (Brief for Respondents, p. 25) is misplaced. In *Bertot v. School District No. 1, Albany County, Wyoming,* No. 76-1169 (10th Cir. November 26, 1979) (En Banc), the 10th Circuit repudiated the prior panel opinion. The en banc decision held that a good faith defense was *not* available to the School District. The Court En Banc followed the analytical framework established by this Court's prior cases and discussed in Petitioner's prior brief at pages 11-13. The Court of Appeals recognized that municipalities did not have qualified immunity at common law:

> "[W]e begin by noting that the common law did *not* recognize the same qualified immunity in damage actions for public bodies that it did for public officials personally when acting in good faith. Prior to 1871, federal courts often awarded monetary relief in suits against public bodies for violation of the federal Constitution . . . To the extent that public bodies were afforded special protection, it was under the doctrine of sovereign immunity, as embodied in the Eleventh Amendment, a distinct theoretical construct. Where public bodies were amenable to suit, monetary damages were not precluded." Slip Opinion at 5. (Emphasis in the original)

Given this common law background, the Court of Appeals concluded that neither the language nor the legislative history of the Civil Rights Act of 1871 gave any indication that the 42nd Congress "intended to erode school boards' common law amenity to damage actions." Slip Opinion at 6. Since the language of the statute was unqualified, the Court could "not impute to such unequivocal language an intention to provide public bodies with an immunity broader than that enjoyed at common law." Slip Opinion at 6. The Court of Appeals went on to hold that the policy considerations justifying personal immunity for officials gave no support to creation of such an immunity for governmental entities. *Id.* at 7-8, 13-15. The Court further held that "equitable relief is not precluded by a good faith defense." *Id.* at 9-10.

The *Bertot* Court finally concluded "[W]e are faced with the manifest injustice that would result should Bertot not be compensated for the unconstitutional non-renewal of her contract." By comparison it did not seem unfair to the Court to hold liable a municipal entity which has demonstrably abused its powers to the injury of an individual victim. It deemed it fair that the costs of unconstitutional government action should be spread among the taxpayers, who reap the benefits of their government and who are ultimately responsible for it. "Section 1983 has, at its core, a concern for fundamental fairness between a powerful government and the individual." Slip Opinion at 15.

The 10th Circuit gave "particular attention" to the Eighth Circuit's two opinions in the present case. *Id.* at 10-12. It described the second decision as a "drastic flip-flop in that Circuit's immunity doctrine," which ignored the first opinion's "highly persuasive arguments for considering back pay to be an element of equitable relief

not protected by a public entity's good faith defense." *Id.* at 10. It rejected the Eighth Circuit's analysis of *Monell* and concluded: "We therefore do not believe that *Owen II* provides adequate justification for either providing the good faith defense to the School District or deciding any issue of relief beyond back pay." The *Bertot* Court also dealt with the earlier Second Circuit decision in *Sala v. County of Suffolk*, 604 F.2d 207, 210-11 (2nd Cir. 1979). The argument was accepted in *Sala* that imposition of liability on the School District as an entity would similarly deter creative and effective decision-making, since conscientious board members are as concerned about board liability as about personal liability. The Tenth Circuit rejected the conclusion of *Sala*, stating "[A]s a statement of purported psychological fact, we find that assertion unpersuasive." Slip Opinion at 8.

We should not end our discussion of *Bertot* without a comment as to the dissenting opinion of Judge Barrett which states (clearly erroneously we submit) that denying a "good faith" defense to a municipality might expose it to substantial "financial repercussions." (Slip Opinion Dissent of Judge Barrett, pp. 1-2) Judge Barrett's undifferentiated concern for "financial repercussions" seems to view the cost to a city occasioned by its unconstitutional acts as paramount over the right of individuals to be made whole for violations of their constitutional rights. Such has never been the law. The argument had already been rejected by this Court prior to the enactment of the Civil Rights Act of 1871. In *City of Galena v. Amy*, 5 Wall. 705, 710 (1867), the Court said:

> "The Counsel for the [city] has called our attention, with emphasis and eloquence, to the diminished resources of the city, and the disproportionate magnitude of its debt. Much as, personally, we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them."

Similarly, such consideration cannot outweigh the rights of individuals injured by unconstitutional municipal actions.

CONCLUSION

For the foregoing reasons, the opinion of the Court of Appeals on remand should be reversed and the cause remanded for appropriate relief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1779

GEORGE D. OWEN,

Petitioner,

—against—

THE CITY OF INDEPENDENCE, MISSOURI, et al.,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION AND THE CENTER FOR CONSTITUTIONAL RIGHTS AS AMICI CURIAE

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INTEREST OF AMICI

The American Civil Liberties Union is a nationwide, non-profit, nonpartisan organization of approximately 200,000 members. The New York Civil Liberties Union is its state-wide affiliate operating in New York State. Since their creation nearly sixty years ago, the ACLU and the NYCLU have been dedicated to the cause of personal liberty through a vigorous defense of the safeguards embodied in the Bill of Rights.

This case is of special interest to the Civil Liberties Union because its principal issue - whether municipalities may invoke a good faith defense to actions brought under 42 U.S.C. §1983 - will largely determine whether a meaningful remedy is available to victims of unconstitutional governmental policy. Moreover, the ACLU and the NYCLU are raising the same legal issue before the Court in their capacity as counsel to the petitioners in Sala v. County of Suffolk, No. 79- , petition for writ of certiorari pending. The facts in Sala underscore the practical importance of the novel legal question now presented to the Court.

Specifically, the County defendant in Sala successfully invoked a good faith defense to escape liability for an "insensitive, demeaning and stupid" strip-search policy conducted in violation of the Fourth Amendment. The strip search procedures at issue were routinely applied to all

*Letters of consent from all parties to the filing of this brief are being filed with the Clerk of the Court.

pre-arraignment detainees regardless of the charge they faced or whether there was any suspicion that a particular detainee possessed dangerous weapons or illegal contraband. The record in Sala clearly demonstrated that the searches were unnecessarily intrusive, and the district court agreed.

However, despite her victory on the merits of her claim, petitioner in Sala was denied any monetary relief on the ground that the defendants, including the County, had acted in good faith. As its sole reason for affording that defense, the court noted that no settled authority had previously found the particular type of search at issue to be unconstitutional. That ruling was affirmed by the United States Court of Appeals for the Second Circuit. If this Court upholds a municipal good faith defense in the instant action, petitioner in Sala will be left without redress despite the district court's finding that her constitutional rights were grossly abused by an official County policy which was enacted without thought and implemented without regard to individual privacy interests.

The Center for Constitutional Rights is a non-profit organization devoted to litigation protective of rights under the Constitution. The issue of governmental immunity from liability under 42 U.S.C. §1983 is of immediate significance for many of the Center's clients, including the plaintiff class in Monell v. Department of Social Services of the City of New York, 436 U.S. 412 (1978). Plaintiffs in Monell are now seeking back pay as a result of New York City's unconstitutional policy of

requiring mandatory pregnancy leaves.

Following this Court's remand in Monell, plaintiffs have engaged in protracted settlement negotiations with counsel for the City of New York in an effort to compromise the class claims. Unfortunately, this effort has failed and litigation has been resumed. The City of New York has made it clear that its principal defense is its claimed good faith in promulgating and applying the challenged pregnancy leave rules. As a result, the Monell plaintiffs have a direct interest in the question presented by the instant case, and their success or failure may well turn on the result reached here. Monell presents a factual setting illustrative of a particular interaction between law and municipal policy-making which is not present in Owen but which should be taken into account by this Court in determining whether a good faith defense exists for municipalities, and, if it does, in describing its contours.

Amici will argue that the facts underlying Sala and Monell specifically, and §1983 actions against municipalities generally, evidence the inappropriateness of adopting a broad good faith immunity for municipalities under 42 U.S.C. §1983.

ARGUMENT

I. CREATION OF A GOOD FAITH DEFENSE OR OTHER SPECIAL IMMUNITY DEFENSE FOR MUNICIPALITIES WOULD BE INCONSISTENT WITH CONGRESSIONAL INTENTION IN ENACTING §1983, AND WOULD UNDERMINE IMPORTANT POLICY CONSIDERATIONS.

It is undisputed that neither the text nor the legislative history of 42 U.S.C. §1983 expressly establish a good faith or other special immunity defense for municipalities. The question, then, is whether the judiciary should create a defense which Congress has not expressly established. In answering that question, the Court should review the legislative history of §1983 to determine whether creation of such a defense would further, or frustrate, Congressional objectives, and should determine whether creation of such a defense would advance, or undermine, other important policy considerations.

A. Judicial Creation of a Special Defense For Municipalities Would Frustrate Congressional Objectives.

At the time Congress enacted the Civil Rights Act of 1871, the common law did not confer a special immunity on municipalities who were amenable to suit. This fact was certainly known to Congress and nothing in the legislative history of §1983 suggests that Congress intended to change this common law rule, a point carefully documented in the amicus brief submitted in this case by the Lawyers Committee for Civil Rights Under Law and the National Education Association, which amici adopt.

But even if Congress had not so clearly rejected establishment of a special immunity defense, it is undeniable that judicial creation of such a defense would frustrate Congressional objectives in enacting §1983. As this Court acknowledged in Monell, the 1871 Civil Rights Act is a "remedial" statute.1/ The overriding objective of the 42nd Congress was to create a remedy for violation of federally protected rights, including, specifically, a damages remedy against municipalities. Monell at 684 . Judicial creation of a special immunity defense for municipalities would certainly frustrate that objective. It would be inappropriate, on both legislative interpretation and separation of powers grounds, for the judiciary to take back what Congress sought to grant. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) Congress had, and has, the power to establish such a special defense if it chooses to do so. And given the clearly remedial objectives of §1983, creation of such a defense is a matter for Congress, not the courts, to decide.

1/Proponents of the 1871 Civil Rights Act repeatedly described it as a "redress for wrongs," correcting the lack of a "remedy" and urging that it was "the duty of the national government. . .to provide an ultimate remedy for the redress of every wrong inflicted upon the citizen." CONG. GLOBE, 42d Cong., 1st Sess. 368(1871)(remarks of Rep. Sheldon). See generally E. Schnepper, "Civil Rights Litigation After Monell" 79 Col. L.Rev. 213, 243-244 (1979).

B. Jucidial Creation of a Special Defense For Municipalities Would Undermine Important Policy Considerations.

Although general tort law principles are certainly relevant, it must be remembered that §1983 provides a remedy only for violations of constitutional or other federally protected rights. Given our heritage, the need to compensate and deter such constitutional torts should be even more apparent, and more compelling, than in a non-constitutional context.

If it is appropriate for municipalities to think carefully before adopting policies that might violate ordinary rights, it is even more critical that municipalities think carefully before adopting policies that might violate constitutional rights. Similarly, although the risks of liability should not be so great as to preclude municipalities from acting at all, it is appropriate that the scope of any deterrent effort be broader when a contemplated policy might violate constitutional rights than when it might violate lesser rights.

It has always been thought to be sound policy to provide "an incentive to shun practices of dubious legality," particularly when those practices might violate constitutional rights. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975). A special immunity defense for municipalities would seriously undercut that socially useful deterrent effect, and would encourage municipal indifference to or disregard for the consequences of municipal policies. See Note, "The Discretionary Exception and

Municipal Tort Liability: A Reappraisal," 52 Minn. L. Rev. 1047, 1057 (1968).

Thus, important policy considerations would be undermined by creating a special immunity defense for municipalities. The countervailing policy considerations which support a "good faith" defense for the acts of individuals do not apply to the policies of municipalities.

Judicial creation of a good faith defense for individual public officers has been justified on two grounds:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his office, to exercise discretion;
>
> (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). Neither of these rationales justifies creation of a special immunity defense for municipalities.

As the Second Circuit correctly noted in Sala, the first rationale - the injustice of imposing damage awards on individuals who are under a legal obligation to act - is completely inapplicable to municipalities. The municipality sued for promulgating an unconstitutional policy is not in the position of an officer whose

only choice is to ignore a municipal policy and be "charged with dereliction of duty" or to enforce that policy and be "mulcted in damages." Pierson v. Ray, 386 U.S. 547, 555 (1967). Unlike the officer, the municipality has the power to change its policy.

Contrary to the Second Circuit's view in Sala, the second rationale - avoiding undue deterrence in decision-making - is equally inapplicable to municipalities. Such considerations are peculiar to personal liability.2/

Under Monell, municipalities are not liable for their acts, even if unconstitutional, but only for their policies. And careful deliberation is the essence of the policy-making function. Unlike the individual, who frequently must act immediately if he or she is to act at all, and who may be unduly deterred from acting because of an unfounded fear of liability which time for reflection and consideration would dispel, municipalities engaged in the policy-making process will not be deterred by fears of liability which, upon

2/See Carter v. Carlson, 447 F.2d 358, 367 n. 27 (D.C.Cir. 1971), rev'd on other grounds sub nom. District of Columbia V. Carter, 409 U.S. 418 (1973) ("With respect to some government functions, the threat of individual liability would have a devastating effect, while the threat of government liability would not significantly impair performance.") See also 3 K. Davis, Administrative Law Treatise at 830, 863-866 (1970).

reflection, seem unfounded.3/ On the other hand, if the contemplated policy seems, upon reflection, to present a realistic risk of liability, it is then appropriate that the municipality consider alternative policies, or abandon the contemplated policy entirely.

Accordingly, the policy considerations which justify a special defense for individuals do not justify such a defense for municipalities engaged in the deliberative policy-making process.

3/ The line police officer does not have time to request legal advice before arresting a criminal suspect; the municipality does have time to request such advice before adopting the policy which serves as the authority for the arrest. It should be equally obvious, however, that a municipality cannot escape liability by merely solicitinga pro forma opinion from its attorney. That result would completely negate the remedial promise of §1983 and discourage, rather than encourage, a deliberative process which places a proper premium on individual rights.

II. ANY SPECIAL IMMUNITY DEFENSE FOR MUNICIPALITIES SHOULD BE MORE LIMITED THAN THE GOOD FAITH DEFENSE AVAILABLE TO INDIVIDUALS.

Although amici have unusually extensive experience in §1983 litigation, we have found it difficult to construct an immunity formulation that would accomodate the arguably special interests of municipalities without effectively undermining Monell and the objectives of §1983. But though it is difficult to decide, almost in the abstract, what such a special defense should be, it is much easier to decide what it should not be. For the reasons expressed in Point IIA, we think it clear that any special immunity defense for municipalities should not be the equivalent or substantial equivalent of the good faith defense available to individuals. And in Point IIB, we discuss other general considerations that would have to be reflected in any special defense for municipalities.

A. The Good Faith Defense Available To Individuals Is Not Appropriate For Municipalities, And If Extended To Municipalities Would Effectively Overrule Monell.

The Eighth Circuit in this case, and the Second Circuit in Sala, unjustifiably extended to municipalities the same good faith defense available to individuals. Those decisions cannot be sustained.

First, as we noted in Point I, the reasons which justify a good faith defense for the spontaneous acts of individuals who are under a legal obligation to act,

and often to act quickly without time for deliberation, do not apply at all to the more discretionary and deliberative policy-making process of a municipality. Because the roles and responsibilities of the policy-maker and the policy-implementor are very different, a special defense that is appropriate for one cannot be fully appropriate for the other.

Second, extending to municipalities the same good faith defense available to municipal employees would effectively "drain [Monell] of meaning." Monell, 436 U.S. at 701, and would transform the very basis for municipal liability - where a "policy" has "caused" and is "responsible" for constitutional injury - into a justification for immunity for all defendants.

With very few exceptions, a municipal line officer implementing an official policy will almost always be afforded an individual good faith defense. See generally, Friedman, "The Good Faith Defense in Constitutional Litigation," 5 Hofstra L. Rev. 501 (1977). Similarly, policymaking officials are granted a broad personal immunity reflecting their discretionary duties. See Scheuer v. Rhodes, 416 U.S. 232, 246 (1974). Thus, both the policy officer and the police commissioner will usually be immune if they acted pursuant to an official policy. Because a municipality can act only through its agents, creating a municipal immunity that is co-extensive with the individual immunity of municipal employees would effectively create an "absolute" immunity for municipalities, a result expressly precluded by Monell, 436 U.S. at 701, and directly contrary to the interest of the 42nd Congress.

It would at least be arguable, though we think not persuasive, to provide derivative immunity when the liability of the governmental entity is itself derivative.4/ But in Rizzo v. Goode, 423 U.S. 362, 371-372 (1976), and again in Monell, 436 U.S. at 694, this Court interpreted §1983 to preclude derivative or respondent superior liability. Since municipalities can be found liable only for their own policies, not for the acts of their individual employ-es, there is no justification for providing a derivative immunity to municipalities in §1983 litigation.

B. Any Special Immunity Defense For Municipalities Should Be Carefully Constructed To Protect Constitutional Rights.

In order to protect the remedial purposes of §1983, any special immunity defense for municipalities fashioned by this Court should be directed toward structuring the decision-making processes of municipalities in a manner most likely to safeguard fundamental constitutional rights. Thus, while it may not be sufficient, it is certainly necessary that municipalities consider the individual interests likely to be affected by their policies and less intrusive ways of meeting municipal goals.

The immunity test should also make clear that the absence of prior and binding judicial precedent will not automatically entitle the municipality to immunity. The almost infinite variety of policies that

4/ Cf. Norton v. United States, 581 F.2d. 390 (4th Cir.), cert. denied, 47 U.S.L.W. 3391 (Dec. 5, 1978.)

could be adopted, and the almost infinite variety of individual interests that could be affected by such policies, make it highly unlikely that the legality of any particular policy, as it affects a particular individual interest, will previously have been determined by the Supreme Court, or perhaps by any court.

Of course, if the Supreme Court had previously decided that a similar policy violated federal constitutional principles, a municipality which continues or adopts that policy, in the face of the Supreme Court's decision, should be held liable for damages.

Simiarly, if a municipality pursues an official policy following a decision declaring a similar policy unlawful by a lower court or administrative agency having jurisdiction over it, as in Monell, the municipality should be liable for damages. As a matter of law, a municipality can fairly be presumed to have knowledge of relevant decisions by tribunals with jurisdiction over it. If a municipality continues its policy in the face of those decisions, it must proceed at its own risk. Any other result would totally undermine the adjudicatory authority of the lower federal courts, the state courts, and the state and federal administrative agencies, thereby encouraging municipal recalcitrance.

Correspondingly, the weight and precedential value of decisions in other jurisdictions are relevant factors in determining a municipality's liability for damages. Ordinarily, however, when a federal court in any jurisdiction has held a similar policy unlawful, a municipality should be required to proceed at its own risk in

applying that policy.

Even if no court or administrative agency had previously found a similar policy unlawful, a municipality should not necessarily be immune.

For example, when the text of the Constitution itself makes it apparent that the municipality's policy affects fundamental rights clearly protected by the Constitution, it is surely unreasonable for the municipality to be protected by a blanket immunity merely because there was no prior judicial precedent directly on point. Thus, in Sala, the County necessarily knew that its policy of routinely strip-searching all detainees clearly implicated constitutional rights and might be found to violate those rights. In such cases, conditioning municipal liability on the existence of prior judicial precedent would encourage municipal indifference to constitutional rights, and would therefore frustrate the Congressional objectives reflected in §1983.

Thus, the Eighth Circuit in this case, and the Second Circuit in Sala, erred in relying on the absence of prior on-point precedents from this Court as a justification for imposing an absolute immunity. Accordingly, even if the Court does not accept the principles enumerated in Point I of this brief, the case must nonetheless be remanded for further consideration in light of the considerations discussed in Point II of this brief.

CONCLUSION

The decision of the Eighth Circuit should be reversed and this Court should hold that municipalities may not invoke a special immunity defense in §1983 actions. In the alternative, this Court should hold, along the lines suggested in this brief, that any special immunity defense available to municipalities in §1983 actions is more limited than that applied by the Eighth Circuit below and should accordingly remand this case for further consideration.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1979

No. 78-1779

GEORGE D. OWEN,
Petitioner,

v.

THE CITY OF INDEPENDENCE, MISSOURI, *et al.*,
Respondents.

BRIEF FOR NATIONAL EDUCATION ASSOCIATION AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AS AMICI CURIAE

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTEREST OF THE AMICI CURIAE [1]

The National Education Association (NEA) is the largest teacher organization in the United States, with a membership of approximately 1.7 million educators, virtually all of whom are employed by public educa-

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[1] Consents of all parties to the filing of this brief have been filed with the Clerk.

tional institutions. One of NEA's purposes is to safeguard the constitutional rights of teachers and other public educators.

The Lawyers' Committee for Civil Rights Under Law is a non-profit corporation organized in 1963 at the request of President Kennedy. Its Board of Trustees includes several past presidents of the American Bar Association, two former Attorneys General, and a former Solicitor General of the United States. The Committee's primary mission is to involve private lawyers throughout the country in the quest of all citizens to secure their civil rights through the legal process.

The resolution of this case will have an important impact upon the extent to which those who are injured by the unconstitutional actions of public officials and entities can secure complete relief in the federal courts. Both *amici* have a vital interest in the resolution of this case.

Pursuant to that same interest these *amici* filed a brief in *Monell* v. *Department of Social Services of the City of New York,* 436 U.S. 658 (1978). In *Monell* this Court held that municipalities are "persons" and can be sued directly under § 1983 for monetary relief. The Court left open, however, the question whether municipalities should be afforded any form of qualified immunity in such suits. That question is presented in the instant case, and its resolution will determine whether complete relief is, indeed, available in the federal courts to those who suffer injuries from unconstitutional actions of municipalities.

This brief is filed to provide the Court with the views of the *amici,* refined through extensive litigation under

the Fourteenth Amendment and 42 U.S.C. § 1983, that municipalities do not enjoy any form of immunity from damage liability for violations made actionable by § 1983.

SUMMARY OF ARGUMENT

I. The question here is solely one of statutory interpretation: Did the Congress that enacted § 1983 intend to provide municipalities with some form of immunity against liability for damages in § 1983 suits? Congress intended no such immunity. The words of § 1983—that municipalities "shall be liable to the party injured in an action at law"—are broadly remedial and contain no indication of a congressional intention to adopt an immunity for municipalities. And, Congress knew that the statute would subject municipalities to monetary liability, yet there was not a mention in the entire course of legislative consideration of the bill that municipalities would or should have any immunity in suits under § 1983.

Further, there was no "tradition" of any municipal immunity "so well grounded in history and reason" that the 1871 Congress must be assumed to have *sub silentio* incorporated an immunity into its enactment —indeed, the "tradition" was that wherever municipalities were subject to suit, which by 1871 was a broad range of cases, they had no immunity of any kind. As of 1871, municipalities were subject to suit for every breach of contract, for every violation of constitution or statute (whether state or federal), and for a wide range of torts. In all instances where they were subject to suit, municipalities had no immunity of any kind against damage awards. Particularly pertinent here,

it was well established as of 1871 that enactment of a statute imposing liability on municipalities did not carry with it any implicit damage immunity; whenever municipalities were made subject to damage liability by statute, that liability was enforced without extending any immunity to the municipalities. Congress cannot be assumed to have silently intended that the enactment of § 1983 would carry with it an immunity for municipalities which did not then exist with respect to any other cause of action against municipalities.

II. The court below, and others, without having established the necessary predicate of legislative intent, have nevertheless held that § 1983 provides municipalities a qualified damage immunity, basing their holdings upon one or the other of two distinct rationales. Neither of these rationales furnishes a proper justification for importing any kind of municipal damage immunity into § 1983.

A. There is no basis for "extending" to municipalities the qualified immunity enjoyed by public officials against personal liability. Nothing could be plainer than that as of 1871 the good faith immunity enjoyed by public officials was wholly inapplicable to damage awards against the public treasury. The English courts, which had established the public official immunity doctrine later followed by the American courts, had repeatedly declared the doctrine "inapplicable" to damage awards against the public treasury. The American cases similarly recognized the propriety of awarding damages against municipalities notwithstanding that the wrong was committed in the good faith and reasonable belief that it was lawful.

Further, the reasons which underlie the common-law qualified immunity for public officials in their individ-

ual capacity do not justify a similar immunity for governmental entities. And, twice recently this Court has recognized that fact. *Hutto* v. *Finney,* 437 U.S. 678, 699, n. 32 (1978); *Lake County Estates* v. *Tahoe Regional Planning Agcy.,* 440 U.S. 391, 405 n. 29 (1979).

B. There were two common law doctrines which insulated municipalities from certain types of tort actions altogether, regardless of the relief sought (injunctive or monetary). Neither could have formed a predicate for an unexpressed congressional intent to qualify the damage liability of municipalities in § 1983 actions.

1. The sovereign immunity enjoyed by municipalities at common law with respect to certain of their functions affords no basis for imputing to Congress an unstated intention to limit the amenability of municipalities to damage awards under § 1983. Sovereign immunity was not a damage immunity. Its effect, where it applied, was to insulate the municipality from suit altogether. The doctrine's existence did not reflect a prudential judgment about the desirability of holding municipalities accountable for their torts; rather, it reflected a matter of power—as the sovereign made the law, it could be sued only if and to the extent it chose to subject itself to the law it made. Given the nature of that immunity, it was by definition abrogated by enactment of a statute by the state (or, where, as here, federal power exists, the federal government) subjecting a municipality to suit. Such enactments by states were widespread as of 1871, and their effect was to make municipalities liable in damages without immunity. There is no basis for attributing to Congress a different intention when it made municipalities suable in this statute.

2. There was also at common law a doctrine insulating municipalities from tort suits challenging "discretionary" decisions. This was not an immunity; rather, it defined what constituted a cause of action and what did not. If the law of negligence had been made applicable to every decision of a municipality, then the legislative judgments of the elected officials could have been subjected to judicial review on a claim they were not "reasonable," and judges and juries could thereby have second-guessed and overturned discretionary decisions entrusted to the legislature. To protect against this, the courts carved out those functions which were committed to a governmental entity's legislative "discretion" and made them not subject to suit (for injunctive *or* monetary relief) under the "reasonable man" standard. But the rationale of the "discretionary function" doctrine also defined its limits. Where a municipality was subject to "duties which are absolute and imperative in their nature," there was no protection against injunction or damages for "non-performance or mis-performance." The doctrine is thus by its terms inapplicable to § 1983. Municipalities do not have discretion to violate the federal Constitution. The inquiry under § 1983 is not whether public decisions are "reasonable," but whether they are in violation of the federal Constitution and/or federal statutes. The very purpose of § 1983 was to vest the federal courts with the power to conduct this inquiry. The "discretionary function" doctrine cannot justify a presumption that Congress silently intended to create a qualified immunity for municipalities from damage liability under § 1983.

ARGUMENT

I. CONGRESS DID NOT INTEND MUNICIPALITIES TO HAVE ANY IMMUNITY IN § 1983 SUITS.

In this brief we address only the question whether municipalities [2] have some form of immunity in actions brought against them under 42 U.S.C. § 1983, which was enacted as part of § 1 of the Civil Rights Act of 1871. The question is solely one of statutory interpretation: Did the Congress that enacted § 1983 intend to provide municipalities with some form of immunity against liability for damages in § 1983 suits? As we show below, Congress intended no such immunity. There is no warrant in the language of § 1983 or in its legislative history for finding a congressional intention to establish such an immunity; and, there was no "tradition" of any such immunity "so well grounded in history and reason" [3] that the 1871 Congress must be assumed to have *sub silentio* incorporated an immunity into its enactment—indeed, the "tradition" was that wherever municipalities were subject to suit, which by 1871 was in a broad range of cases, they simply had no immunity of any kind.

The words of § 1983 are broadly remedial and contain no indication of a congressional intention to adopt an immunity for municipalities:

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[2] Throughout this brief, we use the term "municipalities" to include all forms of local government: cities, counties, school districts, etc. This Court drew no distinction between the various forms of local government in *Monell*, concluding that all were embraced within the statutory term "person," 436 U.S. at 690. The analysis we proffer herein likewise would warrant no distinction between them with respect to the immunity question.

[3] *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured in an action at law,* suit in equity, or other proper proceeding for redress. [Emphasis added].

The congressional debates which culminated in passage of this provision confirm Congress' intent that these statutory words were to be given their full sweep. The Act's author and manager in the House, Representative Shellabarger, in his speech introducing the bill, explained the breadth of construction which was contemplated—an explanation which was quoted in *Monell* v. *New York City Dept. of Social Services,* 436 U.S. 658, 684 (1978), and bears repeating here:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. . . . Chief Justice Jay and also Story say:
>
> 'Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws' *Story on Constitution,* sec. 429.

This view of the sweep of the bill was voiced by its sponsors (and acknowledged by its opponents) throughout the debates in passages cited in *Monell,* 436 U.S. at 683-687 and note 45. A repeated theme was that the provision represented the exercise of the entire power which Congress possessed under the Constitution to remedy violations of that Constitution. *Ibid.*

The 1871 Congress made a positive determination to subject municipalities to suits under § 1983. *Id.* at 686, 690. And, that Congress knew that municipalities would be subject to monetary liability in such suits. *Id.* at 690. Yet, there was not a mention in the entire course of legislative consideration of the bill that municipalities would or should have any immunity in suits under § 1983.

The silence of the statute and in the debates on the subject of an immunity for municipalities is of course powerful evidence that none was intended. But congressional intent may sometimes be discerned from other sources. That has proven to be true with respect to the personal immunities which this Court has found are enjoyed by public officials under § 1983. This Court has found that at the time of the enactment of § 1983, the state of the law was that many public officials were immunized, either absolutely or qualifiedly, from personal liability for their official acts. When this Court encountered damage claims against such officials, it was confronted with the question whether the 1871 Congress intended, *sub silentio,* that the existing personal immunities would be applicable in suits under § 1983. The Court recognized that this "immunity ques-

tion involves the construction of a federal statute. . . ." *Wood* v. *Strickland,* 420 U.S. 308, 314 (1975). The question thus was not whether an immunity might make sense as a policy matter, but whether Congress intended its inclusion in § 1983. Where an immunity was well established in 1871 and its rationale compatible with the purposes of § 1983, this Court "presume[d] that Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson* v. *Ray,* 386 U.S. 547, 555 (1967). Using the words of Mr. Justice Frankfurter in the seminal case on this issue, *Tenney* v. *Brandhove,* 341 U.S. 367, 376 (1951), where there was in 1871 a "tradition" of an immunity "so well grounded in history and reason" that "[w]e cannot believe Congress . . . would [have] impinge[d]" upon it by "covert inclusion in the general language [of § 1983]," § 1983 was construed to incorporate that immunity.[4]

The claim that the 1871 Congress must have intended municipalities to have some form of immunity in § 1983 suits has not previously been resolved by this Court. It is our submission that this claim founders on the most basic threshold proposition: there was simply no immunity for municipalities that the 1871 Congress could have assumed it was incorporating in § 1983.

[4] On that basis, the Court in *Tenney* concluded that § 1983 adopted the absolute immunity of legislators as to what they do or say in legislative proceedings. Applying the same analysis, this Court has found § 1983 to provide an absolute immunity for judges, *Pierson v. Ray, supra,* and prosecutors, *Imbler* v. *Pachtman,* 424 U.S. 409, 424 (1976), and a qualified immunity for other categories of public official. *Pierson, supra; Scheuer* v. *Rhodes,* 416 U.S. 232 (1974); *Wood* v. *Strickland, supra; O'Connor* v. *Donaldson,* 422 U.S. 563 (1975); *Procunier* v. *Navarette,* 434 U.S. 555 (1978).

Congress may not be found to have incorporated in its enactment, *sub silentio,* an immunity which did not exist.

As of 1871, municipalities were suable for most of their actions. They were subject to suit for every breach of contract, for every violation of constitution or statute, whether federal or state, and for a wide range of torts.[5] And, in all instances where they were subject

[5] *Federal Constitutional Violations.* The most important provision of the federal Constitution, prior to the Reconstruction Amendments, imposing duties upon municipalities was the Contract Clause. As was observed in *Monell,* 436 U.S. at 681, the federal courts "vigorously enforced the Contract Clause against municipalities—an enforcement effort which included various forms of 'positive' relief, such as ordering that taxes be levied and collected to discharge federal-court judgments, once a constitutional infraction was found." In addition to the cases cited in *Monell, id.* at 673, n. 28, see *Havemeyer* v. *Iowa County,* 3 Wall. (70 U.S.) 294, 303 (1866); *Thompson* v. *County of Lee,* 3 Wall. (70 U.S.) 327, 330 (1866); *Mitchell* v. *City of Burlington,* 4 Wall. (71 U.S.) 270 (1867); *Butz* v. *City of Muscatine,* 8 Wall. (75 U.S.) 575, 584 (1869).

Federal Statutory Violations. Federal patent laws were in effect from 1790 on. Note, *On the Patent Laws,* 4 L.ed. 488. Damage actions against municipalities for infringement of patent were common, and the remedial standards were identical to those applied in suits against private defendants. See, e.g., *Corp. of New York* v. *Ransom,* 23 How. (64 U.S.) 487 (1860); *Bliss* v. *Brooklyn,* 3 Fed. Cases 706 (E.D. N.Y. 1871); *Allen* v. *New York,* 1 Fed. Cases 506 (S.D.N.Y. 1879). We found no other federal statute of broad applicability which imposed duties upon municipalities prior to 1871, and which thus could have produced litigation seeking monetary relief from municipalities. For two narrow federal statutes which led to monetary judgments, see *Roach* v. *Commonwealth,* 2 Dall. (2 U.S.) 206 (Pa.) (judgment against State, prior to adoption of Eleventh Amendment); *Levy Court of Washington County* v. *Woodward,* 2 Wall. (69 U.S.) 501 (1865).

State Constitutions. Most state constitutions contained a provision prohibiting takings without just compensation. These provi-

to suit, regardless of the form of the action, municipalities had no immunity of any kind against damage awards; in all such suits, their liability in damages was

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sions were regularly enforced against municipalities through damage awards. Note, *Right of One Whose Property Has Been Taken for Public Use Without His Consent and Without Condemnation Proceedings to Maintain Action for Compensation or for Permanent Damages*, 28 L.R.A. (N.S.) 968 (1910). During the 1870's, many state constitutions were amended to broaden the "just compensation" principle beyond literal "takings" to property injuries inflicted incidentally (e.g., by regrading the streets so that a merchant's store was no longer accessible to the public). The state courts "have been unanimous in holding that under such constitutional provision a city is liable to [the property owner] for all direct and consequential damage arising from its action in grading or changing the grade of its streets, unless he is compensated under the power of eminent domain before the work is done . . ." Note, *Streets, Change of Grade, Liability of Cities*, 30 Am. St. Rep. 835, 837 (1892) (citing cases).

State Statutes. State statutes imposed many obligations upon municipalities, the violation of which was enforceable by damage action. The statutes authorizing suits for damages for a municipality's failure to prevent a riot, the analogue upon which the Sherman Amendment had been modeled, was much discussed during the debates on § 1983, *Monell*, 436 U.S. at 667-668, n. 17, as was the New York Court of Appeals' 1865 decision rejecting a city's claim that the statute violated the city's right to due process under the state constitution, *Darlington* v. *Mayor of New York*, 31 N.Y. 164 (1865) (see passages cited in *Monell*, at 667-668, n. 17). In some states, the extension of the "just compensation" principle to nontakings was accomplished by state statute, rather than constitutional amendment. Note, *Streets, Change of Grade, supra*, 30 Am. St. Rep. at 848-849. State statutes restricting the grounds for discharging municipal employees, or requiring due process incident to discharge, gave rise to damages in actions denominated "contract" (see below under "Employment Cases"). And, most importantly, state statutes were applied widely to sustain tort damage awards (see below under "Torts", and *infra*, pp. 27-30).

Employment Cases. Claims of wrongful discharge by municipal employees invariably were treated as "contract" actions, and dam-

understood to be identical to that of private corporations and private individuals. There were, to be sure, two common law doctrines which insulated certain mu-

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ages were regularly awarded against municipalities for wrongful discharge. Thus an 1880 treatise stated: "Where [a] teacher is wrongfully dismissed on charge of incompetency or any similar charge, he is entitled to recover from the district his wages for the balance of the term contracted for." Burke, *A Treatise on the Law of Public Schools* 84 (1880). Accord, Bardeen, *Common School Law* 46 (4th ed. 1888); Taylor, *Public School Law of the United States* 295 (1892). Many of these were true "breach of contract" actions. See, e.g., *Mason* v. *School District No. 14*, 20 Vt. 487 (1848); *George* v. *School District No. 8*, 20 Vt. 493 (1848); *Richardson* v. *School District No. 10*, 38 Vt. 602 (1866); *Batchelder* v. *City of Salem*, 58 Mass. 599 (1849); *Trustees of the Town of Milford* v. *Simpson*, 11 Ind. 520 (1858); *City of Crawfordsville* v. *Hayes*, 42 Ind. 200 (1873); *Brown* v. *Rundlett*, 15 N.H. 360, 370 (1844). But many were really actions for violation of statutes requiring due process, or restricting the grounds for discharge, and damages were awarded for such statutory violations under the rubric "breach of contract." See, e.g., *Paul* v. *School District No. 2*, 28 Vt. 575, 578-580 (1856) (statute construed to limit grounds to incompetency or unfaithfulness); *Inhabitants of Searsmont* v. *Farwell*, 3 Maine 450 (1825) (statute limiting grounds); *Shaw* v. *Mayor of Macon*, 19 Ga. 468, 469 (1856) (same); *Jackson* v. *Inhabitants of Hampden*, 16 Maine 184 (1839) (dismissal without adherence to statutory procedures); *School District* v. *McComb*, 18 Colo. 240 (1893) (same); *Ransom* v. *Boston*, 196 Mass. 248, 81 N.E. 998 (1907) (same).

Contract Cases Generally. "Upon authorized contracts," municipalities were "liable in the same manner, and to the same extent, as private corporations or natural persons." Dillon, *Treatise on the Law of Municipal Corporations* 702 (1872). See also Burke, *A Treatise on the Law of Public Schools* 66-67 (1880); *City of Chicago* v. *Greer*, 9 Wall. (76 U.S.) 726 (1870). The most frequently litigated breach of contract actions, at least in federal court, were those for failure to pay interest on municipal bonds. *Commissioners of Knox County* v. *Aspinwall*, 21 How. (62 U.S.) 539 (1859); *Amey* v. *Allegheny County*, 24 How. (65 U.S.) 364 (1861); *Bissell* v. *City of Jeffersonville*, 24 How. (65 U.S.) 287 (1861); *Curtis* v. *County of Butler*, 24 How. (65 U.S.) 435 (1861); *Woods* v. *County*

nicipal functions from suit in tort, for any type of relief (injunctive as well as monetary). We discuss these *infra*, at pp. 25-34, and show that they have

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of Lawrence, 1 Black (66 U.S.) 386 (1862); *Moran* v. *Miami Co.*, 2 Black (67 U.S.) 722 (1863); *Von Hostrup* v. *City of Madison*, 1 Wall. (68 U.S.) 291 (1864); *County of Mercer* v. *Hackett*, 1 Wall. (68 U.S.) 83 (1864); *Seibert* v. *Mayor of Pittsburg*, 1 Wall. (68 U.S.) 272 (1864); *Myer and Stucken* v. *City of Muscatine*, 1 Wall. (68 U.S.) 384 (1864); *County of Sheboygan* v. *Parker*, 3 Wall. (70 U.S.) 93 (1866); *Rogers* v. *City of Burlington*, 3 Wall. (70 U.S.) 93 (1866); *Larned* v. *City of Burlington*, 4 Wall. (71 U.S.) 275 (1867); *Campbell* v. *City of Kenosha*, 5 Wall. (72 U.S.) 194 (1867); *City of Aurora* v. *West*, 7 Wall. (74 U.S.) 82 (1869). A city's plea that execution of judgment would cause it great harm met with this response from the Supreme Court:

> The Counsel for the [city] has called our attention, with emphasis and eloquence, to the diminished resources of the city, and the disproportionate magnitude of its debt. Much as, personally, we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them. Such securities occupy the same ground in this Court as all others which are brought before us. When clothed with legal validity it is our purpose to sustain them, and to give to their holders the benefit of all the remedies to which the law entitles them . . . [W]e cannot recognize a distinction, unknown to the law, between this and any other class of obligations we may be called upon to enforce.

City of Galena v. *Amy*, 5 Wall. (72 U.S.) 705, 710 (1867).

Torts. As explained *infra*, pp. 25-31, the common law divided the functions of municipalities into two categories, "governmental" and "proprietary," and rendered municipalities suable for tort only with respect to their "proprietary" functions (the "governmental" functions being shielded by the state's sovereign immunity). However, as also explained *infra*, pp. 27-30, the states by statute withdrew sovereign immunity with respect to many "governmental" functions, thus giving rise to a body of statutory tort law which was well developed by 1871. Wherever municipalities were suable, they were liable for their negligent acts "on the same principles and to the same extent as a private corporation." Dillon,

no relevance to the construction of § 1983. The point at this juncture is that it was well understood that this common law insulation was overridden by the enactment of a statute making municipalities accountable in court, and such statutes were widespread as of 1871. The enactment of such a statute did not carry with it any implicit damage immunity for municipalities; when municipalities were made subject to statutory liabilities in damages, these liabilities were enforced without extending any immunity to the municipalities.[6] Congress cannot be assumed to have thought that the enactment of § 1983 would carry with it an immunity for municipalities that did not exist under other forms of statutory liability.

Treatise on the Law of Municipal Corporations 33 (1872). Accord: Beach, *Commentaries on the Law of Public Corporations* 265 (1893); Shearman & Redfield, *A Treatise on the Law of Negligence* 139, 149, 159 (1869); *Bailey* v. *Mayor of New York*, 3 Hill 531, 538-539 (N.Y. 1842); *Danbury* v. *Norwalk RR Co.* v. *Town of Norwalk*, 37 Conn. 109, 119 (1870). Similarly, "[i]n regard to the *use* of its corporate property, a municipal corporation [was] bound to an observance of the same rules which the law impose[d] on individuals," and was therefore "responsible, as an individual would be under the same circumstances, for the creation and maintenance of a public nuisance, and [was] liable to a public prosecution, or to a private action at the suit of any one specially injured thereby." Shearman & Redfield, *supra* at 181. See also *Walker* v. *Hallock*, 32 Ind. 239, 244 (1869). And, "the federal courts found no obstacle to awards of damages against municipalities for common-law takings." *Monell*, 436 U.S. at 687, n. 47. For an indication of the enormous volume of tort damage awards which had been rendered against municipalities as of 1871, see generally the cases and materials cited *infra* at pp. 19-20, 27-28.

Execution of Monetary Judgments Against Municipalities. For a comprehensive description of the manner in which federal and state courts achieved execution of monetary judgments against municipalities as of 1871, see *Riggs* v. *Johnson County*, 6 Wall. (73 U.S.) 166 (1868). See also *Monell*, 436 U.S. at 674, n. 30.

[6] See *infra*, pp. 19-20, 27-29.

It is important to understand how we derived certain of the propositions set forth in the preceding paragraph. There were literally thousands of reported cases as of 1871 awarding damages against municipalities for wrongs they were found to have committed. We do not purport to have read all of them. We have read several hundred of those cases and examined contemporaneous treatises discussing thousands more. We did not find a single case in which a municipality was held to have committed an actionable wrong and yet was insulated from paying damages from those injured by that wrong. Indeed, there appear to have been only a handful of cases in which the question of a damage immunity for municipalities was even addressed, and in each it was rejected out of hand.[7] It is always difficult to prove a negative; we cannot say that no case exists in which some court found some municipality immune from damages; we can only say that we could not find one and the treatises do not mention any. But the question here is whether there was a municipal immunity from damages so well established in the law of the time that Congress must have intended to adopt it as part of § 1983. That question can be answered definitively: if there were such an immunity, there would not have been a multitude of cases where municipalities were found to be liable in damages without even asserting the immunity; and, there would not have been uniform rejection of the existence of the immunity in those rare cases we could find where it was asserted.

In § 1983, Congress enacted a statute that declares without qualification that municipalities "shall be liable" to parties injured by violations of federal Con-

[7] See *infra*, pp. 18-20.

stitutional or statutory duties "in an action at law, suit in equity, or other proper proceeding for redress." There is no basis for attributing to Congress an unstated intention to qualify the statutory declaration by conferring upon municipalities an immunity that did not exist elsewhere in the law. Nevertheless, the court below, and others, without having established the necessary predicate of legislative intent, have found it appropriate to adopt such an immunity, based upon one or the other of two distinct rationales. We discuss these rationales separately below, and show the impropriety of adopting an immunity for municipalities based on either.

II. THE ARGUMENTS FOR IMPORTING A MUNICIPAL DAMAGE IMMUNITY INTO § 1983 ARE WITHOUT FOUNDATION.

A. "Extending" To Municipalities The Qualified Immunity Enjoyed By Public Officials Against Personal Liability

The court below chose to "extend the limited immunity [enjoyed by] the individual defendants to cover the City as well," 589 F.2d at 338. No explanation was proffered below for this extension, and nothing could be plainer than that as of 1871 the good faith immunity enjoyed by public officials sued in their individual capacity—an immunity which had evolved out of concern for "the harshness and impolicy of casting on individuals a public duty, and making them responsible out of their private means for the non-fulfillment of it"[8]—was wholly inapplicable to damage awards against the public treasury. The English courts,

[8] Shearman & Redfield, *A Treatise on the Law of Negligence* 209 (1869).

which had established the official immunity doctrine later followed by the American courts,[9] had repeatedly declared the doctrine "inapplicable" to damage awards against the public treasury.[10] As Baron Bramwell explained in *Ruck* v. *Williams,* 3 Hurlst. & N. 308, 319 (1858):

> I can well understand if a person undertakes the office or duty of a Commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that, if one of several Commissioners does something not within the scope of his authority, the Commissioners as a body are not liable. But where Commissioners, who are a quasi corporate body, are not affected (i.e. personally) by the result of an action, inasmuch as they are authorized by act of parliament to raise a fund for payment of the damages, on what principle is it that, if an individual member of the public suffers from an act bona fide but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law.

The American cases similarly recognized the propriety of awarding damages against municipalities notwithstanding that the wrong was committed in the good faith and reasonable belief that it was lawful. The most cited statement of the principle was Chief

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[9] See *Hodgson* v. *Dexter,* 1 Cranch (5 U.S.) 345, 363-364 (1803); *Bradley* v. *Fisher,* 13 Wall. (80 U.S.) 335, 347-353 (1871).

[10] Shearman & Redfield, *supra,* at pp. 208-210, and cases cited in n. 1 thereat.

Justice Shaw's opinion in *Thayer* v. *Boston,* 19 Pick. 511, 515-516 (Mass. 1837):

> There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damages sustained by an individual, in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress, except against agents employed, and by what at the time appeared to be competent authority, to do the acts complained of, but which are proved to be unauthorized by law.

Accord: *Town Council of Akron* v. *McComb,* 18 Ohio 229, 230-231 (1849); *Hurley* v. *Town of Texas,* 20 Wis. 665, 669-670 (1866); *Squiers* v. *Village of Neenah,* 24 Wis. 588, 593 (1869); *Lee* v. *Village of Sandy Hill,* 40 N.Y. 442, 448-451 (1869); *Stoddard* v. *Village of Saratoga Springs,* 127 N.Y. 261, 268, 27 N.E. 1030, 1031 (1891); *McGraw* v. *Town of Marion,* 98 Ky. 673, 680-683, 34 S.W. 18 (1896); *Schussler* v. *Board of Commissioners of Hennepin County,* 67 Minn. 412, 70 N.W. 6, 7 (1897); *City of Oklahoma City* v. *Hill Brothers,* 6 Okl. 114, 137-139, 50 P. 242, 249 (1897); *Bunker* v.

City of Hudson, 122 Wis. 43, 54, 99 N.W. 448, 452 (1904).[11]

We have not found a single case, despite extensive research, in which any American court in the Nineteenth Century "extended" to municipalities the immunity for good faith acts enjoyed by officials against individual liability.

While the court below did not attempt to explain its extension of an immunity intended for public officials in their individual capacity to municipalities, that effort was made by a panel of the Tenth Circuit in *Bertot* v. *School District No. 1, Albany County, Wyoming,* Slip. Op. No. 76-1169 (November 15, 1978), vacated pending rehearing *en banc* (1979).

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[11] In addition to the decisions cited in text, which expressly articulated the *Thayer* principle, there were innumerable decisions awarding damages against municipalities for violations expressly found to have been committed in good faith. See e.g., *Page* v. *Hardin,* 8 B. Monroe 648 (Ky. 1844); *Holden* v. *Shrewsbury Sch. Dist. No. 10,* 38 Vt. 529, 532 (1866); *Horton* v. *Inhabitants of Ipswich,* 66 Mass. 488, 489, 492 (Mass. 1853); *Billings* v. *Worcester,* 102 Mass. 329, 332-333 (1869); *Hawks* v. *Inhabitants of Charlemont,* 107 Mass. 414, 417 (1871); *Freeland* v. *City of Muscatine,* 9 Iowa 461, 464 (1859); *Elliot* v. *Concord,* 27 N.H. 204 (1853); *State of Missouri ex rel Cullen* v. *Carr,* 3 Mo. App. 6, 10 (1876); *Weed* v. *Borough of Greenwich,* 45 Conn. 170, 183 (1877); *Woodcock* v. *City of Calais,* 66 Me. 234, 235-236 (1877); and see generally, Note, *Liability of Cities for the Negligence and Other Misconduct of Their Officers and Agents,* 30 Am. St. Rep. 376, 405-411 (1893). Still other cases recognized that the doctrine of official immunity was inapplicable to suits against the municipality, without inquiring further into the existence or non-existence of good faith. *Shaw* v. *Mayor of Macon,* 19 Ga. 468, 469 (1856); *County Commissioners of Anne Arundel County* v. *Duckett,* 20 Md. 468, 481-482 (1863); *Brown* v. *Rundlett,* 15 N.H. 360, 370 (1844); *Morrison* v. *McFarland,* 51 Ind. 206, 210 (1875), citing *City of Crawfordsville* v. *Hays,* 42 Ind. 200 (1873).

This Court in *Scheuer* v. *Rhodes,* 416 U.S., *supra* at 240, and *Wood* v. *Strickland,* 420 U.S., *supra* at 319-320, had spelled out the reasons underlying the common-law qualified immunity for public officials in their individual capacity: (1) that individuals should not be deterred from seeking public office by the risk of *personal* financial exposure; (2) that it would be unfair to subject those who *do* accept public service to personal liability for good faith performance of their office; and (3) that public officers should make decisions on public matters in the *public* interest and should not be rendered timid by the need to weigh on the scales a personal, non-public consideration, i.e., concern for their potential *personal* liability.

The Tenth Circuit panel in *Bertot* found the third of these factors to justify a good faith immunity for the government entity as well as for the individual public officials (slip op. at 5-6):

> The reasons for the application of the doctrine of qualified immunity are as compelling when considering the members individually as they are to the evaluation of the members acting collectively. . . . It is apparent that conscientious board members will be just as concerned that their decisions or actions might create a liability for damages on the board or the local entity as they would on themselves. The restriction on the exercise of independent judgment is the same. The individuals are the same in whatever capacity, their good faith is the same in each capacity whether it is individual good faith, board good faith when considered collectively or official capacity good faith.
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> * * * *
>
> Qualified immunity should thus be applied to the board as such and to the individuals in their offi-

> cial capacities. . . . The individuals with this qualified immunity conduct the official board business, make the decisions, and carry on the official business. If they have such immunity, there would seem to be no reason why it should not be carried into their collective actions as a board.

The rationale of the *Bertot* court is doubly wrong: it misapprehends the role of a court in construing § 1983; and it misapprehends the rationale for the public official immunity doctrine.

First, as we discussed above, at pp. 7-10, *supra,* the question is not whether immunizing municipalities is a good idea, but whether there is any reason to conclude that Congress intended to establish such an immunity *sub silentio* in § 1983. In the absence of an established body of law recognizing such an immunity in 1871, there is no justification for attributing such an intent to Congress. And as we have shown, the law in 1871 was all to the contrary.

Second, the *Bertot* panel misunderstood the public interest sought to be protected by the third of the reasons listed above underlying the public official immunity. The Court in *Wood, supra,* stated that reason as follows (420 U.S. at 319-320):

> Denying any measure of immunity in these circumstances "would contribute not to principled and fearless decision-making but to intimidation." . . . The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decision-maker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students.

The *Bertot* panel assumed that public officials would be deterred from acting "forcefully" by entity liability as well as by personal liability, and that therefore the reason expressed in *Wood* would equally justify an immunity for the governmental entity—i.e., public officials must be able to act free from the concern that their actions on behalf of the entity might violate the law and thus result in monetary liability for the entity. But the predicate of the statement in *Wood,* and of the common law from which it drew, is that public officials' judgments on the public matters with which they deal should not be clouded by *personal* considerations, i.e. the threat to their own pocketbooks. It hardly follows that they should be equally insulated from considering the impact of their decisions on the treasury of the entity they were elected to serve. Consideration of possible "corporate" liability is appropriate in any decision-making process, and indeed is essential to assuring that governmental entities will comport themselves in a manner consistent with their legal obligations. Constitutional and statutory proscriptions on the conduct of governmental entities are meant to be taken into account and to affect the decisions of those charged with running those entities. The consideration of possible entity liability is a proper public concern and should not be confused with the personal concern raised by the possibility of individual liability.[12]

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[12] See *Johnson* v. *State of California,* 69 Cal.2d 782 (1968), in which the court considered whether "[t]he danger that public employees will be insufficiently zealous in their official duties" might serve as a basis for entity immunity under state laws. Noting that official immunities were developed to protect public employees "from the spectre of extensive *personal* tort liability" (*id.* at 790; emphasis added), the court stated that it did not "deem an employee's concern over the potential liability of his employer, the

Twice recently, this Court has recognized that the considerations underlying the public official immunity do not apply to governmental entities. In *Hutto* v. *Finney*, 437 U.S. 678, 699 n. 32 (1978), the Court, in approving an award of attorney's fees from the state treasury, criticized the dissenters who "would apparently leave the officers to pay the award," because the latter result would:

> . . . def[y] this Court's insistence in a related context that imposing personal liability in the absence of bad faith may cause state officers to "exercise their discretion with undue timidity." *Wood* v. *Strickland*, 420 U.S. 308, 321.

Similarly, in *Lake County Estates* v. *Tahoe Planning Agcy.*, 440 U.S. 391, 405 n. 29 (1979), the Court, while holding individual regional legislators to be immune, stated that "[i]f the respondents have enacted unconstitutional legislation, there is no reason why relief against [the entity] itself should not adequately vindicate petitioners' interests."

B. Extrapolating A Qualified Immunity From The Insulation Which Municipalities Enjoyed From Certain Tort Actions At Common Law

In his concurring opinion in *Monell*, 436 U.S. at 713-714, Mr. Justice Powell noted that one of the questions remaining "for another day" was "whether the protection available at common law for municipal cor-

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governmental unit, a justification for an expansive definition of . . . immune acts." *Id.* at 792. The court "consider[ed] it unlikely that the possibility of governmental liability will be a serious deterrent to the fearless exercise of judgment by the employee," but believed that if such deterrence did occur, it might well be "wholesome." *Id.* at 792.

porations, see post, at 720-721, support[s] a qualified municipal immunity in the context of the § 1983 damages action." The reference was to a passage in Mr. Justice Rehnquist's dissenting opinion noting that "no state court had ever held that municipal corporations were always liable in tort in precisely the same manner as other persons," *id.* at 720-721. The Second Circuit has ruled that this consideration warrants extending to municipalities a qualified good faith immunity from damages for injuries caused by their constitutional violations. *Sala* v. *County of Suffolk*, 604 F.2d 207, 211 (2nd Cir. 1979).

There were, indeed, two common law doctrines which insulated municipalities from certain types of tort actions altogether, regardless of the relief sought, injunctive or damages. We discuss each of those doctrines now, and show that neither could have formed the predicate for an unexpressed congressional intent to qualify the damage liability of municipalities in § 1983 actions.

1. Sovereign Immunity (the Governmental/Proprietary Distinction).

At common law, the doctrine of sovereign immunity insulated state governments from tort actions. When the state delegated certain of its functions to a municipality, the municipality was deemed an "arm of the state." "In chartering a municipal corporation, the state, in fact, charters a portion of itself . . . A municipal organization is only a contrivance to aid the state to administer the laws . . ." Shearman & Redfield, *supra*, at p. 143. With respect to those "governmental" functions the municipality enjoyed the state's sovereign immunity from suit:

> So far as [municipal corporations] exercise powers conferred on them for purposes essentially public—purposes pertaining to the administration of general laws made to enforce the general policy of the state—they should be deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action be given. In reference to such matters they should stand as does sovereignty, whose agents they are, subject to be sued only when the State by statute declares they may be.

Beach, Commentaries on the Law of Public Corporations, 266 (1893), quoting *City of Galveston* v. *Posnainsky,* 62 Tex. 118 (1884).[13]

Certain of a municipality's functions, however, were deemed not to have been delegated by the state, but rather to have been voluntarily adopted by the citizens of the municipality. As to these "proprietary" functions, municipalities were treated the same as private corporations:[14]

> [W]ith respect to local or municipal powers proper (as distinguished from those conferred upon the municipality as a mere agent of the state)

[13] Accord: Cooley, *Treatise on the Constitutional Limitations* 240 (1868). The doctrine of sovereign immunity at common law differed in scope, purpose and effect from the immunity extended by the Eleventh Amendment. Thus, while the common-law doctrine applied to some functions of municipalities, "[t]he bar of the Eleventh Amendment to suit in federal courts . . . does not extend to counties and similar municipal corporations." *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U.S. 274, 280 (1977). See also *Edelman* v. *Jordan,* 415 U.S. 651, 667 n. 12 (1974); *Moor* v. *County of Alameda,* 411 U.S. 693 (1973); *Lincoln County* v. *Luning,* 133 U.S. 529 (1890).

[14] Except in South Carolina, see pp. 28-29 n. 17, *infra.*

> the inhabitants are to be regarded as having been clothed with them at their request and for their peculiar and special advantage and . . . as to such powers and the duties springing out of them, the corporation has a *private* character, and is liable, on the same principles and to the same extent as a private corporation.

Dillon, *Treatise on the Law of Municipal Corporations* 33 (1st ed., 1872).[15]

In reality, by 1871 municipal corporations were far more amenable to suits in tort than the governmental/proprietary distinction would suggest. For sovereign immunity was lost if "by statute the action be given." Beach, *supra,* at 266. During the early and mid-Nineteenth Century, the courts found that as to many "governmental" functions the states had by statute withdrawn the immunity. The process by which this was accomplished is described in Shearman & Redfield, *supra,* pp. 145-153, and in Note, *Liability of Cities for the Negligence and Other Misconduct of Their Officers*

[15] Accord: Cooley, *supra,* at p. 248; Beach, *supra,* at 770. This dichotomy resulted in cities being more generally amenable to tort actions at common law than counties and school districts, for the latter were considered to be exercising delegated "state" powers in most if not all of their activities:

> Counties, townships, school districts, and road districts do not usually possess corporate powers under special charters; but they exist under general laws of the State, which apportion the territory of the State into political divisions for convenience of government, and require of the people residing within those divisions the performance of certain public duties as a part of the machinery of the State. . . . Whether they shall assume those duties or exercise those powers, the political divisions are not allowed the privilege of choice; the legislature assumes this division of the State to be essential in republican government. . . .

Cooley, *supra,* at 240. Accord: Beach, *supra,* at 267.

and Agents, 30 Am. St. Rep. 376, 380-387 (1893). While a minority of the state courts required explicit statutory conferral of a cause of action to lift sovereignty, 30 Am. St. Rep. at 384—rulings which often were followed by the enactment of such explicit statutes, *ibid*—"a decisive majority of the courts in this country, both state and national" ruled that the imposition of a duty upon a municipality by charter or statute "*implies* that redress should be accorded in the courts to anyone injured by its non-performance or mis-performance," *id.* at 385 (emphasis added). By whichever route was followed in a particular state, there developed throughout the nation an entire body of *statutory* tort law: causes of action which could not have been brought at common law were brought pursuant to statute. See, e.g., *City of Providence* v. *Clapp,* 17 How. (58 U.S.), 161, 167-169 (1855); *Weightman* v. *Washington,* 1 Black (66 U.S.) 39, 50-52 (1862); *Nebraska City* v. *Campbell,* 2 Black (67 U.S.) 590, 592 (1862); *Chicago* v. *Robbins,* 2 Black (67 U.S.) 418, 422-425 (1863); *Barnes* v. *District of Columbia,* 91 U.S. 540, 544-552 (1876).[16]

Municipalities thus were broadly amenable to tort actions as of 1871: for their "proprietary" actions they were suable at common law the same as a private corporation, and for their "governmental" actions they were suable to the extent—and it was a considerable extent—that statutory causes of action had been created as described above.[17] And in both contexts—the common

[16] State court cases to the same effect are collected in Note, *supra,* 30 Am. St. Rep. at 380-387.

[17] In his dissenting opinion in *Monell,* 436 U.S. at 721, Mr. Justice Rehnquist cited *Irvine* v. *Town of Greenwood,* 89 S.C. 511

law action for "proprietary" torts, and the statutory action for "governmental" torts—municipalities were found liable in damages in a multitude of cases;[18] our research did not disclose a single case where a municipality was afforded any immunity, qualified or otherwise, from paying damages for injuries resulting from an actionable tort.[19]

The sovereign immunity enjoyed by municipalities at common law affords no basis for imputing to Congress an unstated intention to qualify the amenability

(1911), as reflecting a view that municipalities enjoyed "absolute" tort immunity. In *Irvine,* the South Carolina Supreme Court rejected the "governmental/proprietary" distinction, and held that all functions of municipalities were "governmental." The *Irvine* court acknowledged that its ruling conflicted with decisions of the United States Supreme Court, decisions in other states, and the views expressed in the treatises, and it cited no decision from any other state supporting its position. The effect of its decision, as the court recognized, *id.* at 514, 518, was to render municipalities suable only for statutory torts, i.e., in causes of action which the General Assembly of South Carolina had authorized by statute.

In *Sala,* 604 F.2d, *supra* at 211, the Second Circuit, citing Mr. Justice Rehnquist's dissent, read a *good faith* immunity into § 1983, reasoning that as § 1983 was "enacted by a Congress accustomed to nearly absolute municipal immunity" its statute should not "be read to implement a doctrine of liability without fault." Even if this were not a *non sequitur,* its premise (that Congress was "accustomed to nearly absolute municipal immunity") overlooked both the universal acceptance (outside of South Carolina) of the proprietary functions doctrine and the statutory developments rendering municipalities suable for "governmental" acts.

[18] See sources cited at pp. 19-20, 27-28.

[19] Although not a damage *immunity,* there was a rule of damages applicable with respect to at least some municipal torts that, in order to recover, the "plaintiff [must have] sustained some peculiar damage beyond the rest of the King's subjects" by reason of the tort. *Weightman* v. *Washington,* 1 Black (66 U.S.) 39, 53 (1862), citing *Mayor of Lyme* v. *Henley,* 3 B. & Ad. 77 (1832).

of municipalities to damage awards under § 1983. The doctrine of sovereign immunity was not a damage immunity. Its effect, where it applied, was to insulate the municipality from suit altogether, and thus to preclude the entry of any kind of relief (injunctive as well as monetary) against the municipality. The doctrine's existence did not reflect a prudential judgment about the desirability or undesirability of holding municipalities monetarily accountable for their torts, but, rather, reflected a truth about the nature of power: as the sovereign made the law, it could be sued only if and to the extent it chose to subject itself to the law it made. *Beers v. Arkansas,* 20 How. (61 U.S.) 527, 529 (1858); *Kawananakoa* v. *Polyblank,* 205 U.S. 349, 353 (1907). The law of torts was state law; the state was the sovereign which made that law; and except as the state elected to subject itself (and its "arms," the municipalities) to obedience to that law, and assume accountability in its courts for failure to obey, no action would lie.

Given the nature of that immunity, it was by definition abrogated by enactment of a statute by the state or, where federal power exists, the federal government, subjecting a municipality to liability. The abolition of sovereign immunity through the statutory creation of causes of action was widespread by 1871, and its effect was that municipalities were made subject to damage liability without immunity.[20] With respect to violations of the federal Constitution and federal statutes, Congress was the "sovereign"; the states had no control over the decision of Congress whether their subordi-

[20] See pp. 27-29, *supra.*

nate governmental bodies could be sued.[21] When Congress decided to include municipalities among the "persons" against whom a § 1983 cause of action could be brought, and thus to make municipalities amenable in damages for violating those negative duties imposed by the Fourteenth Amendment, *Monell, supra,* 436 U.S. at 679-680, it rejected *en toto* the sole foundation upon which the common law immunity had rested, i.e. the unavailability of suit. It cannot be presumed that the 1871 Congress intended this imposition of statutory liability to carry with it a municipal immunity from damages when in no other statutory action against municipalities did such an immunity exist.

There is, accordingly, nothing about the common law doctrine of sovereign immunity which justifies imputing to Congress an unstated intention to create a "qualified" immunity for local governmental bodies in § 1983 suits. To impute to Congress such an intention would require assuming that Congress intended, without expressing its intention in the statute or the debates, to create an immunity entirely unknown to the law. The state of the law in 1871 was that entities either were suable or were not, and if suable they had no immunity. Congress made them suable under § 1983, and there is no conceivable basis for imputing to Congress an intention that they should enjoy a qualified immunity.

[21] And the authority which Congress was exercising, that bestowed by the Fourteenth Amendment, was federal authority, not state authority. The laws enacted by Congress during the post-Civil War period were "grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the states' ratification of [the 13th, 14th and 15th] Amendments." *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 455-456 (1976).

2. *The Insulation of "Discretionary" Functions From Negligence Suits.*

There was also at common law a doctrine protecting municipalities from tort suits challenging "discretionary" decisions. If the law of negligence had been made applicable to every decision of a municipality, then the legislative judgments of the elected officials could have been subjected to judicial review on a claim that they were not "reasonable". The effect would have been to transfer the ultimate legislative power to judges and juries. To protect against this, the courts fashioned a distinction between those functions which were committed to the governmental entities' legislative "discretion" and those as to which municipalities were under a specific mandate to act (or not to act) in a particular way. The former were not subject to challenge under the "reasonable man" standard. This was not an immunity; rather, it defined what constituted a cause of action and what did not. Its development did not reflect a concern unique to monetary liability; indeed, a principal concern was to protect against injunctions requiring elected officials to alter their legislative judgments:

> The statute may enjoin, absolutely and imperatively, the performance of an act or duty, or it may leave it to the discretion of the corporation either to do it or not to do it. If the latter is the case, courts cannot compel the performance of such duties, or hold the corporation responsible civilly for its refusal to act. A large part of the functions of a city corporation are legislative or governmental, and necessarily a wide discretion is confided to it in determining the means of accomplishing its ends, and the courts will not supervise that discretion. Otherwise, if the courts could by writ of mandamus or other process compel the opening

> and paving of streets, building of sewers, &c., not in conformity with the views of local officers, inextricable confusion in the administration of government would ensue. For the duty of building public works of this kind is one requiring the exercise of deliberation, judgment, and discretion. It admits of a choice of means, and the determination of the order of time in which such improvements shall be made. It involves also a variety of prudential considerations relating to the burdens which may be discreetly imposed at a given time and the preference which one locality has over another.

Shearman & Redfield, *supra,* at 153-154 (footnotes omitted). The vice, as the treatises and cases uniformly recognized, was that maintenance of actions challenging decisions of this type "would transfer to court and jury the discretion which the law vests in the municipality." Beach *supra,* at p. 265; Cooley, *supra,* at pp. 253-255; it would place decision-making "in the judiciary, instead of in the city council, where the Legislature placed it." *City of Little Rock* v. *Willis,* 27 Ark. 572, 577 (1872).[22]

But the rationale of the "discretionary function" doctrine also defined its limits. Where a municipality was subject to "duties which are absolute and imperative in their nature," there was no protection against injunction or damages for "non-performance or misperformance." Shearman & Redfield, *supra,* at p. 159. The doctrine was simply inapplicable "when a specific and clearly defined duty is enjoined." *Weightman* v. *Washington,* 1 Black (66 U.S.), 39, 50 (1862).

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[22] Accord: *Weightman* v. *Washington,* 1 Black (66 U.S.) 39, 49-50 (1862); *Johnston* v. *District of Columbia,* 118 U.S. 19, 20-21 (1886); *Carr* v. *The Northern Liberties,* 35 Penn. State 324, 329-330 (1860).

And thus it is evident that the insulation of municipalities from judicial second-guessing of their "discretionary" decisions is by its terms inapplicable to the duties made actionable in § 1983. Municipalities do not have "discretion" to violate the federal Constitution. The inquiry under § 1983 is not whether public decisions are "reasonable" but whether they are in violation of the federal Constitution and/or federal statutes. It was the very purpose of § 1983 to vest the federal courts with the power to conduct this inquiry. The discretionary function doctrine, having no application to the "absolute and imperative" obligations made actionable in § 1983, cannot justify a presumption that Congress silently intended to create a qualified immunity from damage liability in § 1983.

CONCLUSION

The following propositions, we believe, are dispositive of the issue in this case:

(1) Congress enacted a statute, § 1983, which, without qualification, declared that municipalities "shall be liable to the injured party in an action at law" for their violations of the federal Constitution and federal statutes.

(2) The express congressional purpose was to extend the broadest relief that it was within Congress' power to provide to parties injured by violations of the federal Constitution and statutes made actionable in § 1983.

(3) There is not a hint in the debates that Congress intended to confer any immunity upon municipalities.

(4) The state of the law as of 1871 was that wherever municipalities were made suable they enjoyed no immunity whatever from damage liability.

(5) In particular, the state of the law as of 1871 was that the imposition of a statutory duty upon municipalities carried with it no implicit form of damage immunity.

In the light of these propositions, it would be a distortion of Congressional will to construe § 1983 as conferring any immunity upon municipalities for the violations made actionable by that statute.

Accordingly, the decision below should be reversed.

Respectfully submitted,

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